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EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down. or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

WILCOX & CO

No. 8843

United States Circuit Court of Appeals

For the Ninth Circuit.

SWIFT AND COMPANY, a Corporation,
Appellant,

vs.

HARRY J. GRAY,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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BROBECK, PHLEGER & HARRISON,
Crocker Bldg., San Francisco, Calif.;
T. L. SMART, Esq.,
60 California St., San Francisco, Calif.,
Attorneys for Appellant.

JOHN M. WELSH, Esq.,
BUTLER, VAN DYKE & HARRIS,
Capital National Bank Bldg.,
Sacramento, Calif.,
Attorneys for Appellee.

In the Superior Court of the State of California,
in and for the County of Sacramento.

No. 53148 Dept. 2

HARRY J. GRAY,
Plaintiff,

vs.

SWIFT AND COMPANY, a Corporation,
Defendant.

COMPLAINT

Plaintiff complaining of defendant, for cause of action alleges:

I.

That defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal place of business in the City

of Chicago, State of Illinois, and qualified to do and doing business in the State of California.

II.

That for some time prior to the 12th day of October, 1934, plaintiff had been an employee of defendant in its packing plant in the City of South San Francisco, State of California; that on or about the 16th day of October, 1934, the defendant, in the presence and hearing of, and to, sundry persons in the County of San Mateo, spoke of and concerning the plaintiff the following false and slanderous words, to-wit:

"Harry (meaning the plaintiff) is short in his accounts with the Company. He has been taking the Company's money. He has collected money of the Company and has not turned it in." [1*]

That the words aforesaid, to-wit, "Harry is short in his accounts with the Company", meant, were intended by the defendant at said time and place to mean, and were understood by said sundry persons to whom said words were spoken to mean, that the plaintiff has been guilty of embezzling the funds of defendant entrusted to his care as an employee of defendant;

That the words aforesaid, to-wit, "He has been taking the Company's money", meant, were intended by the defendant at said time and place to mean, and were understood by said sundry persons to whom said words were spoken to mean, that the

*Page numbering appearing at the foot of page of original certified Transcript of Record.

plaintiff had been guilty of embezzling the funds of defendant entrusted to his care as an employee of defendant;

That the words aforesaid, to-wit, "He has collected money of the Company and has not turned it in", meant, were intended by the defendant at said time and place to mean, and were understood by said sundry persons to whom said words were spoken to mean, that the plaintiff had been guilty of embezzling the funds of defendant entrusted to his care as an employee of defendant.

III.

That the said publications were, and each of them was, false and defamatory, and that in consequence thereof plaintiff was defamed and slandered, was unable to obtain employment within the City and County of San Francisco, or within the County of San Mateo all to plaintiff's damage in the sum of Two Thousand ($2,000.00) Dollars.

IV.

That by reason of the speaking and publication of the said false and defamatory words, plaintiff has been injured in his reputation, has suffered great and grievous mental pain and suffering, and has been generally damaged in the sum of Fifty Thousand ($50,000.00) Dollars. [2]

Wherefore, plaintiff prays for judgment against the said defendant in the sum of Fifty-two Thousand ($52,000.00) Dollars, for his costs of suit, and

for such other and further relief as may be proper in the premises.

JOHN M. WELSH
BUTLER, VAN DYKE & HARRIS
Attorneys for Plaintiff.

State of California
County of Sacramento—ss.

John M. Welsh, being first duly sworn, deposes and says:

That he is one of the attorneys of record in the above entitled action, representing the plaintiff, and that as such he makes this affidavit of verification for and on behalf of said plaintiff, for the reason that said plaintiff is without the County in which said attorney has his offices; that he has read the foregoing Complaint and knows the contents thereof and that the same is true of his own knowledge, except as to such matters as may be therein stated upon information or belief, and as to those matters, if any there be, he believes the same to be true.

JOHN M. WELSH

Subscribed and sworn to before me this 11th day of October, 1935.

[Seal] A. E. WEST
Notary Public in and for the County of Sacramento, State of California.

[Endorsed]: Filed Oct. 11, 1935. [3]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL OF CAUSE TO UNITED STATES DISTRICT COURT

To the Honorable, the Superior Court of the State of California, in and for the County of Sacramento:

The petition of Swift and Company respectfully represents; shows and alleges as follows, to-wit:

I.

Your petitioner is the defendant in the above entitled suit or action. Said suit, as appears from the plaintiff's complaint on file therein, is of a civil nature of law, brought by plaintiff to recover judgment against your petitioner in the sum of Fifty-two Thousand Dollars ($52,000.00) and costs of suit, which claim your petitioner wholly contests and denies and your petitioner alleges that the amount involved in said action, exclusive of interest and costs, exceeds the value of Three Thousand Dollars ($3,000.00).

II.

Your petitioner, the defendant, Swift and Company was at the time of the commencement of this action and it ever since has been, and it was at all of the times herein and in the complaint mentioned, and still is, a corporation, incorporated and existing under the laws of the State of Illinois and a citizen and resident of said State and not a resident of the State of California. [4]

That the said plaintiff was at the time of the commencement of this action and he ever since has been and is now, a citizen and resident of the State of California and a resident of the Northern District of California.

III.

Service of summons was made in said suit on your petitioner on the 23rd day of December, 1935, in the County of San Mateo, State of California, and your petitioner is not required by the laws of the State of California or by the rules of the above entitled court in which said suit is brought, to answer or plead to the complaint of plaintiff therein until the 22nd day of January, 1936.

IV.

Your petitioner files and offers herewith its bond, with good and sufficient surety, for its entering in the Northern Division of the United States District Court in and for the Northern District of California, within thirty days from the date of filing this petition for removal of said cause, a certified copy of the record in said suit and for paying all costs that may be awarded by said district court, if said Court shall hold that said suit was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays this Honorable Court to accept said bond as good and sufficient and to make its order for the removal of said cause to the Northern Division of the United States District Court in and for the Northern District of Cali-

fornia, pursuant to the Act of Congress, in such cases made and provided and for such other and further order as may [5] be proper and to cause the record herein to be removed to the said District Court and that no further or other proceedings be had in said cause in said Superior Court of the State of California, in and for the County of Sacramento.

And your petitioner will ever pray.

T. L. SMART
GERALD M. DESMOND

State of California,
City and County of San Francisco—ss.

T. L. Smart, being duly sworn, deposes and says;

That he is attorney for the petitioner, Swift and Company, a corporation named in the foregoing petition; that the reason this affidavit is not made by an officer of said petitioner but is made by affiant is that there is no officer of the petitioner in the State of California, where affiant resides; that affiant has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge except as to the matters which are therein stated on information and as to those matters that he believes them to be true.

T. L. SMART

Subscribed and sworn to before me this 8th day of January, 1936.

KATHRYN E. STONE
Notary Public in and for the City and County of San Francisco, State of California.

Received copy of the within Petition for Removal of Cause to United States District Court this 10th day of January, 1936.

JOHN M. WELSH
BUTLER, VAN DYKE &
HARRIS
Attorneys for Plaintiff

[Endorsed]: Filed Jan. 15, 1936. [6]

[Title of Superior Court and Cause.]

UNDERTAKING ON REMOVAL OF CAUSE

Know All Men by These Presents: That Maryland Casualty Company, a corporation organized and existing under the laws of the State of Maryland for the purpose of becoming surety on bonds required by law, and which said corporation has complied with the laws of the State of California with reference to doing and transacting business in the said State of California, is held and firmly bound unto Harry J. Gray, the plaintiff in the above entitled action, in the penal sum of Five Hundred Dollars and no/100 ($500.00) lawful money of the United States for the payment hereof well and truly to be made unto the said Harry J. Gray, his successors, representatives and assigns, the said Maryland Casualty Company binds itself, its successors, representatives and assigns firmly by these presents:

Under These Conditions, that Whereas, Swift & Company, an Illinois Corporation, defendant above

named, having petitioner, or is about to petition the Superior Court of the State of California in and for the County of Sacramento for the removal of a certain cause pending, wherein said Harry J. Gray, is the Plaintiff, and the said Swift & Company, an Illinois Corporation, is the Defendant, to the Northern Division of the District Court of the United States for the Northern District of California, for further proceedings on grounds in the said petition set forth, and that all further proceedings in said action in said Superior Court of the State of California in and for the County of Sacramento be stayed;

Now, Therefore, if said petition Swift & Company, an Illinois [7] Corporation, shall enter in the said District Court of the United States for the Northern District of California, Northern Division, within thirty days from the filing of the petition for the removal of this cause to the said District Court, a certified copy of the record of the above entitled suit or action, and shall well and truly pay, or cause to be paid, all costs that may be awarded therein by said District Court of the United States, if such court shall hold such suit was wrongfully or improperly removed thereto, and shall appear and enter special bail in said suit if special bail was originally requisite, then this obligation shall be void; otherwise it shall reman in full force and effect.

In Witness Whereof, said Maryland Casualty Company has caused these presents to be signed

and its corporate seal to be hereto affixed this 8th day of January, 1936.

MARYLAND CASUALTY
COMPANY
By N. C. ANDREWS,
Attorney-in-fact

The within undertaking is hereby approved this 15th day of Jany., 1936.

PETER J. SHIELDS
Judge of the Superior Court

[Endorsed]: Filed Jan. 15, 1936. [8]

[Title of Superior Court and Cause.]

NOTICE OF PETITION FOR REMOVAL

To the plaintiff above named and to John M. Welsh, Esq. and Messrs. Butler, Van Dyke and Harris, Attorneys for Plaintiff:

You and each of you will please take notice that Swift and Company, the defendant in the above entitled action, will on Wednesday, the 15th day of January, 1936, at 10 o'clock A. M., petition the above entitled Court, at the Court Room thereof, in the County Court House in Sacramento, County of Sacramento, State of California, to remove said cause to the Northern Division of the United States District Court, in and for the Northern District of California, by filing a petition and bond, copies of which are hereto attached and made a part

hereof, reference to which is hereby expressly made for further particulars.

Dated 10th day of January, 1936.

T. L. SMART
GERALD M. DESMOND
Attorneys for defendant and Petitioner.

Received copy of the within notice of Petition for Removal (with copy of Petition and bond for removal attached) this 10th day of January, 1936.

JOHN M. WELSH
BUTLER, VAN DYKE & HARRIS
Attorneys for Plaintiff

[Endorsed]: Filed Jan. 15, 1936. [9]

In the District Court of the United States for the Northern District of California.

No. 1394-S

HARRY J. GRAY,

Plaintiff,

vs.

SWIFT AND COMPANY, a Corporation,

Defendant.

ANSWER TO COMPLAINT

Comes now the defendant above named and for its answer to the complaint of plaintiff on file in

the above entitled action, admits, denies and alleges as follows:

I.

Answering Paragraph I of said complaint, defendant admits each and every allegation therein contained.

II.

Answering that portion of Paragraph II of said complaint, commencing with the word "That" on Line 20, Page 1, to and including the word "California" on Line 22, Page 1, defendant admits the allegations of said portion of Paragraph II.

Answering that portion of Paragraph II, commencing with the word "that" on Line 22, Page 1, to and including the word "defendant" on Line 18, Page 2, defendant denies that it or any agent, servant or employee of it at any time spoke of or concerning the plaintiff or otherwise or at all the words or any of them that plaintiff alleges were spoken by defendant in said portion of Paragraph II.

Further answering said portion of Paragraph II (at all times denying that said words were spoken or published) defendant denies that said words or any thereof meant or could have been understood to mean that plaintiff had been guilty of embezzling funds from defendant or from anyone whomsoever or at all.

III.

Answering Paragraph III of said complaint, defendant denies that it or any agent, servant or em-

ployee of it spoke or published said words or any thereof, and further denies that plaintiff was at all defamed or slandered, and further denies that plaintiff was unable to obtain employment within the City and County of San Francisco or within the County of San Mateo or any other place by [10] reason of any act whatever on the part of defendant or any agent, servant or employee of defendant.

Further answering said Paragraph III, defendant denies that plaintiff was damaged in the sum of $2,000.00, and/or in any sum or sums whatever, or at all.

IV.

Answering Paragraph IV of said complaint, defendant denies that it or any agent, servant or employee of it spoke or published said words or any thereof, and further denies that plaintiff has been injured in reputation or otherwise or that plaintiff has suffered mental pain or suffering of any kind, and further denies that plaintiff has been damaged generally or otherwise in the sum of $50,000.00, and/or in any sum or sums whatever, or at all.

As a Second, Separate and Further Defense to the Alleged Cause of Action Set Forth in Said Complaint, defendant alleges:

I.

That the said words which plaintiff alleges were spoken by plaintiff and which plaintiff alleges were false and defamatory were and are, each and all of them true.

II.

That the said words did not mean nor could they be understood to mean that plaintiff had been guilty of embezzling funds of defendant or any person whomsoever.

As a Third, Separate and Further Defense to the Alleged Cause of Action Set Forth in Said Complaint, defendant alleges:

I.

That at the time said words which plaintiff alleges to be [11] slanderous were spoken, if in fact they were spoken or published, plaintiff was an employee of defendant acting in the capacity of salesman, and in said capacity it was the duty of plaintiff to collect money due and owing to defendant from customers of defendant.

II.

That at the time said words were spoken, if in fact they were spoken, the books and records of defendant reflected a shortage in the plaintiff's return of moneys collected from customers of defendant for defendant; that the said alleged false or alleged defamatory words, if spoken at all, were spoken by an employee or agent of defendant to another employee or agent of defendant or to employees, agents or customers of defendant or were spoken in response to inquiries of customers of defendant; that the said words, if spoken, were spoken during the course of an investigation of defendant's records of plaintiff's accounts with

defendant when said records reflected a shortage as hereinbefore stated; that it was during the investigation of this shortage that said words were spoken, if spoken at all, by defendant or some agent or employee of defendant and at said time the party speaking was a person interested in the said investigation and at said time the persons to whom the words were spoken, if in fact they were spoken, were agents, employees or customers of defendant who were also persons interested in said investigation and in the said communication, if said communication were in fact made.

III.

That at the time said words were spoken, if spoken at all, defendant had reasonable and probable cause for believing and did believe that plaintiff was short in his accounts with defendant, and if said words were spoken by defendant or some agent, servant or employee of it, they were spoken during the investigation here- [12] inbefore referred to and without any malice whatsoever toward plaintiff but as fair and impartial comments made in good faith upon a matter arising out of the relationship of employer and employee and were made only to a person or persons interested in the said communication.

As a Fourth, Separate and Further Defense to the Alleged Cause of Action Set Forth in Said Complaint, defendant alleges:

I.

That if said words which plaintiff alleges to be false and defamatory were in fact spoken by defendant or any agent, servant or employee of defendant, said words were spoken at a time more than one year prior to the commencement of this action, and plaintiff's action is therefore barred by the provisions of Subdivision 3 of Section 340 of the Code of Civil Procedure of the State of California.

Wherefore, defendant prays that plaintiff take nothing whatever by his said action, and that it may be hence dismissed with its costs of suit incurred herein.

T. L. SMART
GERALD M. DESMOND
Attorneys for Defendant.

State of California
County of San Mateo—ss.

J. A. White, being duly sworn, deposes and says: That he is an officer, to-wit, General Manager of the defendant corporation; that he makes this affidavit for and on behalf of said defendant corporation; that he has read the foregoing Answer to Complaint and knows the contents thereof; that the same is true [13] of his own knowledge except as to those matters which are therein stated on in-

formation or belief and as to those matters he believes it to be true.

J. A. WHITE

Subscribed and sworn to before me this 15th day of June, 1936.

[Seal] J. J. HEARNE

Notary Public in and for the County of San Mateo, State of California.

[Endorsed]: Filed Jun. 22, 1936. [14]

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant in the sum of One Thousand Seven Hundred and Fifty Dollars ($1750.00).

CLARKE E. WAYLAND

Foreman

[Endorsed]: Filed March 4, 1938. [15]

In the District Court of the United States for the Northern District of California.

No. 1394-S.

HARRY J. GRAY,

Plaintiff,

vs.

SWIFT AND COMPANY, a Corporation,

Defendant.

JUDGMENT

This cause having come on regularly for trial on the 1st day of March, A. D. 1938, being a day in the October 1937 Term of said Northern Division of said Court, before the Court and a Jury of twelve men duly impaneled and sworn to try the issues joined herein, John M. Welsh and B. F. Van Dyke, Esqrs., appearing as attorneys for Plaintiff, and Maurice E. Harrison, Moses Lasky and T. L. Smart, Esqrs., appearing as Attorneys for the Defendant; the trial having been proceeded with on the 1st, 2nd, 3rd and 4th days of March, 1938, in said Term, and evidence, oral and documentary, upon behalf of the respective parties having been introduced and closed and the cause after argument of the Attorneys, and the instructions of the Court having been submitted to the Jury, the Jury having subsequently rendered the following verdict, which was Ordered recorded, to-wit:

"We, the Jury, find in favor of the Plaintiff and assess the damages against the defend-

ant in the sum of One Thousand Seven Hundred and Fifty Dollars ($1750.00) Dollars.

CLARKE E. WAYLAND,
Foreman."

It Is Therefore Ordered and Adjudged that the Plaintiff, Harry J. Gray, do have and recover of and from the defendant, Swift & Company, a corporation, a judgment in the sum of One Thousand Seven Hundred and Fifty ($1750.00) Dollars and for costs taxed in the sum of $126.35.

Entered this 1st day of March, 1938.

WALTER B. MALING,
Clerk,
By F. M. LAMPERT,
Deputy Clerk. [16]

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable A. F. St. Sure, Judge of the United States District Court, in and for the Northern District of California:

Your petitioner, Swift and Company, a corporation, respectfully shows:

1. Petitioner is the defendant in the above-entitled cause.

2. Said cause is an action at law.

3. A final judgment was entered in said cause against petitioner and in favor of the plaintiff Harry J. Gray on the 4th day of March, 1938.

4. Petitioner feels itself aggrieved by said judgment for the reasons specified in the assignment of errors which is filed herewith and desires to take an appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit; under and in accordance with the laws of the United States, in such cases made and provided.

5. Petitioner desires that said appeal shall operate as a supersedeas.

Wherefore, petitioner prays that an appeal may be allowed to it from the said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, that a citation shall issue as provided by law, that an order be made fixing the amount of cost and supersedeas bond or undertaking which petitioner shall give and furnish upon said appeal; that upon the giving of such [17] security a supersedeas shall be allowed and all further proceedings in this Court shall be suspended and stayed and the operation of the judgment shall be suspended until the determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit; and that a transcript of the record, proceedings and papers on which said judgment was based be made and duly authenticated and sent to said United States Circuit Court of Appeals for the Ninth Circuit; and that such other or process issue as may cause the errors complained of to be

corrected by said United States Circuit Court of Appeals.

Dated: April 1, 1938.

MAURICE E. HARRISON
T. L. SMART
MOSES LASKY
BROBECK, PHLEGER & HARRISON
Attorneys for Petitioner Swift and Company, a corporation.

[Endorsed]: Filed Apr. 1, 1938. [18]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING PETITION FOR APPEAL

State of California,
City and County of San Francisco—ss.

George Helmer, being first duly sworn, deposes and says:

That he is a citizen of the United States and a resident of the City and County of San Francisco, State of California; that he is over the age of 18 years and not a party to the above-entitled cause;

That Messrs. Brobeck, Phleger & Harrison, and T. L. Smart, Esq., the attorneys for the defendant, have their offices in the City and County of San Francisco, State of California; that John M. Welsh, Esq. and Messrs. Butler, Van Dyke & Harris, the

attorneys for the plaintiff, have their offices in the county of Sacramento, State of California, in the Capital National Bank Building in the City of Sacramento;

That on the first day of April, 1938, in the City and County of San Francisco, affiant deposited in the United States mail a sealed envelope, with postage thereon fully prepaid, addressed to John M. Welsh, Esq. and Messrs. Butler, Van Dyke & Harris, Capital National Bank Building, Sacramento, California; that said envelope contained a copy of the attached Petition for Appeal; that there is a daily service by United States mail at the place so addressed and that there is a regular communication by mail between said place of mailing and the place so addressed.

GEORGE HELMER

Subscribed and sworn to before me this first day of April, 1938.

[Seal] EUGENE P. JONES

Notary Public in and for the City and County of San Francisco, State of California. [19]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL AND FOR COST AND SUPERSEDEAS BOND.

Upon the petition for appeal filed by defendant, and on consideration of the assignment of errors filed therewith, and upon motion of counsel for the petitioner,

It Is Hereby Ordered that an appeal be and it is hereby allowed as prayed for from the judgment entered herein on March 4th, 1938, upon the petitioner filing herein a bond in the sum of $2500.00, conditioned as required by law and the *fules* of Court, said bond to operate as a supersedeas as well as a cost bond.

It Is Further Ordered that upon the filing of said bond, all further proceedings in this Court shall be suspended and stayed and the operation of the judgment shall be suspended until the determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

It Is Further Ordered that a certified transcript of the record and all proceedings be transmitted to said United States Circuit Court.

Dated: April 1, 1938.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed Apr. 1, 1938. [20]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

The defendant Swift and Company, a corporation, files herein the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in the above-entitled cause from the judgment of this Court, [21] entered on the.....day of March, 1938.

I.

The Court erred in denying the motion made by the defendant at the close of plaintiff's case for a nonsuit. The motion so made was as follows: "The defendant in this case moves for a judgment of nonsuit, or dismissal, on the following grounds: First, that it appears affirmatively from the evidence that the utterances complained of are privileged in character, and that under the provisions of Section 47 of the Civil Code of California and under the Common Law, no cause of action arises therefrom; inasmuch as it appears by uncontradicted testimony that the only communications here made were communications without malice to a person interested therein by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent; or, three, who is requested by the person interested to give the information."

The said motion was thereupon denied by the Court, to which ruling counsel for defendant then and there excepted.

II.

The Court erred in denying a motion made by the defendant at the close of all evidence for a directed verdict in favor of the defendant. The said motion was made as follows: "I move, if the Court please, that the jury be directed to return a verdict for the defendant on the ground that it appears by uncontradicted testimony that the statements here

complained of are privileged in character and that it appears without [22] contradiction that there was no actual malice, and particularly on the ground that it appears that the statements complained of were made by one who is interested in the communication to another person interested in the communication and were made by a person interested and who was requested by the person interested to give the information.

"I assign as an additional ground for a directed verdict for the defendant in this case that the uncontradicted evidence shows that the communication here involved is a privileged communication having been made by a person interested therein to another interested therein, and on the further ground that it was made in response to an inquiry, and on the ground that the uncontradicted evidence shows absence of express malice.

"And further, on the separate ground that there is no proof showing, or tending to show, that the persons who are alleged to have made the statements had authority so to do, or that they made the statements in the course of their employment, or that either of them made the statements under the authority of the defendant."

The Court denied said motion for a directed verdict, to which ruling defendant by its counsel then and there excepted.

III.

The Court erred in denying the defendant's motion for judgment notwithstanding the verdict, said

motion being made before judgment had been entered upon the verdict. The motion was as follows: "I move for judgment in favor of the defendant, notwithstanding the verdict, on the grounds stated [23] in support of my motion for a directed verdict, to-wit, that the uncontradicted evidence in this case shows that any communications made were those of a privileged nature, by a person interested therein to another person interested therein, without malice; secondly, on the ground that any communications made were not made by the defendant or by anyone authorized by the defendant, and that no communication was made by anyone within the scope of his authority."

The Court denied said motion for judgment notwithstanding the verdict, to which ruling the defendant then and there excepted.

IV.

The Court erred in entering judgment in favor of the plaintiff and against the defendant upon the verdict.

V.

The Court erred in giving to the jury, during the course of the charge to the jury, the following instruction which was Plaintiff's Requested Instruction No. 6, to-wit:

> "Slander is a false and unprivileged publication other than libel which charges any person with crime or tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general

disqualification in those respects which the office or other occupation peculiarly requires, or of imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profits, or which by natural consequence causes actual damage."

[24]

To said instruction the defendant, at the conclusion of the Court's charge and in the presence of the jury and before the jury had retired to deliberate on its verdict, objected on the following grounds:

"(a) The complaint raises no issue as to any type of slander except an alleged accusation of a crime, namely, embezzlement. There is no issue raised as to any other type of slander.

"(b) There is no evidence in the case of any alleged utterances which tend to injure the plaintiff in respect of any office, trade, profession or business, particularly with respect to imputing any general disqualification."

and then and there excepted to the said instruction.

VI.

The Court erred in giving to the jury, during the course of the charge to the jury, the following instruction which was Plaintiff's Requested Instruction No. 10, to-wit:

"I instruct you that a man intends the natural consequence of his acts. If, therefore, the jury believes and finds from the evidence that

the natural consequences of the publication complained of was to defame and injure plaintiff in his reputation and character you may properly infer such was the intention of defendant."

To said instruction the defendant, at the conclusion of the Court's charge and in the presence of the jury and before the jury had retired to deliberate on its verdict, objected on the following grounds: [25]

"(a) It is a question for the Court and not the jury what the meaning and consequences of words are. (See defendant's Proposed Instruction No. 5, and authorities there cited.)

"(b) The present is a case of qualified privilege (see defendant's Proposed Instructions Nos. 17, 21, 24, 25 and authorities there cited). In such a case malice must be proved, and there is no presumption of intention or malice inferred (Civil Code, Section 48).

"(c) Even if this were not a case of qualified privilege, which it clearly is, it would be improper to charge that an intent might be presumed because, in such a case, intent would be immaterial, and the requested charge would be misleading. (36 Corpus Juris, p. 1214, Section 162.)"

and then and there excepted to said instruction.

VII.

The Court erred in giving to the jury, during the course of the charge to the jury, the following

instruction which was Plaintiff's Requested Instruction No. 11, to-wit:

> "In an action for slander, the law implies some damage from the uttering of actionable words, and the law further implies that the person using the actionable words intended the injury the slanderer is claimed to effect, and in this case if you find for the plaintiff upon that part of the complaint alleging slander you will determine from all the facts and circumstances proved what damages are [26] to be given him, and in assessing the damages you are not confined to any mere pecuniary loss sustained. Physical pain, mental suffering, humiliation, and injury to the reputation of character, if proved, are proper elements of damage."

To said instruction the defendant, at the conclusion of the Court's charge and in the presence of the jury and before the jury had retired to deliberate on its verdict, objected on the following grounds:

> "(a) Defendant objects on all the grounds stated in the objection to Plaintiff's Requested Instruction No. 10; and also
>
> "(b) Upon the ground that plaintiff has already requested the instruction that it is slanderous to make a false communication which by natural consequences causes actual damage; the present requested instruction that the law implies some damages from utterances

of slanderous words is, in the circumstances, question begging;

"(c) The proposed instruction refers to physical pain of which there is no evidence and for which there may be no recovery in any event;

"(d) The requested instruction will permit recovery of damages in the nature of punitive damages for which there can be no recovery. (See defendant's Proposed Instruction No. 30.)"

and then and there excepted to said instruction.

VIII.

The Court erred in refusing to give to the jury the [27] following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 17, reading as follows:

"Sometimes remarks are made in circumstances and on occasions which the law calls 'privileged.' If a remark is made on a privileged occasion, then even though it is not true and is defamatory, nevertheless it is not regarded as slanderous, and there is no liability unless the words were spoken maliciously, that is to say, with actual malice. If a statement or remark is made without malice by a person interested therein to another person interested therein, it is a privileged publication."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury,

after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon their verdict.

IX.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 18, reading as follows:

> "If a remark, although not in fact substantiated in truth, is made in good faith and in an honest belief that it is true and without any desire or disposition to injure the party of whom it is spoken and without any spite or ill will toward him, then it is not malicious, and if the occasion is privileged, there is no liability."

[28]

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

X.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 19, reading as follows:

> "If a remark is made on a privileged occasion, the burden of proof is upon the plaintiff to establish by a preponderance of evidence that it was made with actual malice. If plaintiff fails to prove that such remark was made

with actual malice, the verdict must be for the defendant and against the plaintiff."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XI.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 20, reading as follows:

"In determining whether or not a communication to a person interested therein by one who is also interested is made without malice, malice is not to be inferred from the mere fact of communication." [29]

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XII.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 21, reading as follows:

"Where the facts and circumstances under which an alleged defamatory publication is made are undisputed, the question of privilege

is one for the Court. Even if you should find that the defendant uttered of the plaintiff the words set out in the complaint, the circumstances under which they were said are undisputed. The Court has considered the matter and instructs you that the occasions were privileged and that if the words were uttered without actual malice (if, in fact, there were any words said), then your verdict must be in favor of defendant and against the plaintiff."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XIII.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred [30] to as Defendant's Proposed Instruction No. 22, reading as follows:

"Where a plaintiff seeks to hold a corporation liable for remarks made by an employee, the corporation cannot be held responsible for the actual malice of the employee, if there was any, unless it had expressly authorized the employee to slander the plaintiff maliciously, or knowing that he uttered a slander maliciously, authorizes and approves what he said. Consequently, if the occasion of an utterance is privileged within the meaning of the instructions already given to you, a corporation cannot be

held liable for utterances of an employee unless first, those utterances were made with actual malice, and in addition, the corporation had expressly authorized the employee beforehand to make the utterance maliciously or thereafter approved of the utterance, knowing of its falsehood."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XIV.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 23, reading as follows:

"There is no evidence whatever that the defendant corporation ever expressly authorized any em- [31] ployee to utter any of the remarks referred to in the complaint or ever approved of any such utterances, and I therefore instruct you that even if some employee did utter such remarks, no actual malice can be charged to the corporation. You will therefore return a verdict in favor of defendant and against the plaintiff."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury,

after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XV.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 24, reading as follows:

> "If an employee of the defendant was sent out by the defendant to interview customers on the plaintiff's route for the purpose of checking up to ascertain what sales the plaintiff had made and what moneys he had collected, if any, then even if you should find that while engaged in that task such employee made the remarks referred to in the complaint to a customer, I instruct you that if the employee acted in good faith and in an honest belief that what he said was true and without any desire or disposition to injure the plaintiff and without any spite or ill will toward him, the remarks were privileged, and even if they were false and derogatory, [32] the defendant cannot be held guilty of slander, and the plaintiff is not entitled to recover damages because of such remarks."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XVI.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 25, reading as follows:

> "A communication, though in fact unfounded in truth, is privileged if made in good faith in the performance of any duty and with a fair and reasonable purpose of protecting the interests of the person making it or the interests of the person to whom it is made. I therefore instruct you that even if you find that the defendant uttered concerning the plaintiff the words complained of, yet if you find that those words were said in good faith in carrying out the company's business and with a fair and reasonable purpose of protecting the interests of the company, then the defendant cannot be held liable even though what was said was not well founded in fact."

To which refusal to give said requested instruction, the defendants excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had re- [33] tired to deliberate upon its verdict.

XVII.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 26, reading as follows:

"Even if you find that some employee of the defendant, while checking the plaintiff's route, made an utterance concerning the plaintiff, as he alleges in the complaint, and even if you find that the utterance was false and made with actual malice, nevertheless you cannot hold the defendant corporation liable for such remarks, if any, unless such employee had been expressly ordered beforehand to go out and make the remark or afterwards the corporation learned that such a remark had been made and approved of it with knowledge of its falsehood."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XVIII.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 27, reading as follows:

"There is no evidence whatever in this case that the defendant corporation ever expressly [34] authorized any employee to utter any of the remarks referred to in the complaint or ever approved of any such utterances, and I therefore instruct you that even if some employee did utter such remarks, no actual malice is chargeable to the corporation. Consequently,

in the event you find that such utterances, if there were any, were made on a privileged occasion as has been explained to you, your verdict must be in favor of the defendant and against the plaintiff."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XIX.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 28, reading as follows:

"Even though you find that the defendant made the statements with respect to the plaintiff alleged in the complaint, nevertheless if you further find that the defendant was interested therein and that such statements were made by the defendant in a communication, without malice, to a person interested therein, I instruct you that the publication is a privileged one and that your verdict must be for the defendant. In determining whether or not the communication is privileged, you may consider all the facts and circumstances surrounding the [35] transaction in order to determine whether or not the defendant was interested in the communication and whether or not the per-

sons to whom the communication was made were also interested therein."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XX.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 33, reading as follows:

"I instruct you that the defendant corporation, Swift and Company, cannot be held responsible for any utterances made or alleged to have been made by Mr. Harbinson. The Court finds that the evidence does not establish that Mr. Harbinson, if he made any of the alleged utterances, was acting within the course or scope of his employment."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XXI.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred [36] to as Defendant's Proposed Instruction No. 34, reading as follows:

"I instruct you that the defendant corporation, Swift and Company, cannot be held responsible for any utterances made or alleged to have been made by Mr. Gould. The Court finds that the evidence does not establish that Mr. Gould, if he made any of the alleged utterances, was acting within the course or scope of his employment."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XXII.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 12, reading as follows:

"Even if you find that the alleged remarks were made by some employee of the defendant and further that the employee had been sent out by the defendant to check the plaintiff's route, that is, to ascertain what sales had been made and what moneys had been collected by the plaintiff, nevertheless it would not be part of the employee's duties nor connected with his assignment to utter the remarks complained of, and defendant cannot be held liable on account of such remarks." [37]

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XXII-A

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 14, reading as follows:

> "The law does not hold an employer liable for every defamatory utterance of an employee. It does not hold an employer responsible for every reckless, thoughtless or even deliberate speech made by an employee concerning or relating to other persons while he is in his employer's service."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict. [38]

XXIII.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 16, reading as follows:

> "If you find that some employee of the defendant uttered the alleged derogatory remarks concerning the plaintiff, that is not enough to

make defendant responsible. If the employee who made such remarks was a salesman on a route, that fact would not by itself authorize him to speak for the defendant on the subject of the plaintiff and would not make the defendant responsible for any such remarks concerning the plaintiff, and if the employee did make such remarks in the circumstances described, they are his own responsibility."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XXIV.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 5, reading as follows:

"The meaning of the language used in an alleged defamatory publication is in the first instance a question for the Court to decide. Where language is unambiguous, it is the province of the Court to determine its construction and to deter [39] mine whether it is capable of the defamatory meaning which the plaintiff claims for it. The plaintiff claims that the defendant said of him that 'Harry (meaning the plaintiff) is short in his accounts with the company.' The Court has considered these

words, and it concludes that these words do not mean and are not reasonably capable to being understood to mean that plaintiff has been guilty of embezzling funds of the defendant entrusted to his care as an employee of defendant. I therefore instruct you that even if you find that the defendant spoke those words of plaintiff, nevertheless it cannot be guilty of slander, and you cannot render a verdict against the defendant on account of those words."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XXV.

The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 6, reading as follows:

"The plaintiff claims that the defendant said of him that 'He (meaning the plaintiff) has collected money of the company and has not turned it in.' The Court has considered these words, and it concludes that these words do not mean and are not reasonably [40] capable of being understood to mean that plaintiff has been guilty of embezzling funds of the defendant entrusted to his care as an employee of defendant. I therefore instruct you that even

if you find that the defendant spoke those words of plaintiff, nevertheless it cannot be guilty of slander, and you cannot render a verdict against the defendant on account of those words."

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict.

XXVI.

The Court erred in permitting the plaintiff Harry J. Gray to testify in response to a certain question over the objection and exception of the defendant as follows:

"Mr. Van Dyke: Q. Now, Mr. Gray, after you left Swift & Company's place of business, after this last conversation, what did you do with regard to seeking employment?

"Mr. Harrison: Now, this, I presume is offered for the purpose of showing a transaction between this witness and other persons with whom he sought employment. We object to that testimony on the ground that it is wholly incompetent, irrelevant and immaterial; it is not shown to have any connection with the alleged slanderous statements until proof is offered by these other persons the statement was made. It is hearsay testimony and has no connection with the slander charged in the complaint.

"The Court: Overruled. [41]

"Mr. Harrison: Exception.

"A. I went to Virden Packing Company and asked for employment. That is the first place I went to."

XXVII.

The Court erred in permitting the plaintiff's witness, Eugene Harbinson, to testify over the objection and exception of the defendant concerning a conversation between the proprietor of the Los Angeles Fruit Market in Burlingame and the witness, as follows:

"Q. Will you just give us the conversation you had with the lady who owned the Los Angeles Fruit Market?

"Mr. Harrison: That is objected to on the ground that it is hearsay, not binding upon this defendant.

"The Court: What is the purpose, Mr. Van Dyke?

"Mr. Van Dyke: To prove the slander.

"Mr. Harrison: We submit it does not show any authority in this witness, so the words spoken by him would not be within the scope of his authority to bind the company.

"The Court: Objection overruled.

"Mr. Harrison: Exception.

"The Court: Yes, exception noted.

"A. I went in and asked this woman if I could see the sales tags which Gray had given her on Friday. After some discussion as to

why she wouldn't let me see it, I told her that Mr. Gray was short in his accounts with the company; that I wanted to find out how much she had paid Mr. Gray on Friday."

XXVIII.

The Court erred in permitting the plaintiff's witness, [42] Eugene Harbinson, to testify over the objection and exception of the defendant concerning a conversation between one of the proprietors of Monte's Meat Market in San Mateo and the witness as follows:

"Q. Now, will you please give the conversation you had with the man at Monte's Market that you called Al?

"Mr. Harrison: Object to that, if the Court please, on the ground that it is irrelevant, incompetent, and immaterial, and hearsay and not authorized by the defendant.

"The Court: Overruled.

"Mr. Harrison: Exception.

"A. I went in and asked him if I could see the sales tag that Mr. Gray had given him on Friday. He said he did not have it with him, and he wanted to know why, and I said I was out checking Mr. Gray's route, that he had been short in his accounts with the company and that I wanted to find out the amount he had paid."

XXIX.

The Court erred in permitting the plaintiff's witness Eugene Harbinson to testify over the objection

and exception of the defendant concerning a conversation between one Lawrence Lewin (known to the witness as "Larry") and the witness, as follows:

"Q. Now, give us the conversation with Larry?

"Mr. Harrison: Same objection already stated, (that it is irrelevant, incompetent, and immaterial and hearsay and not authorized by the defendant.)

"The Court: Yes, overruled. Exception.

"Mr. Harrison: Exception. [43]

"A. I said that I wanted to see the sales tag Mr. Gray had given him on Friday. There was some discussion as to why I wanted to see it, and I told him that Mr. Gray was short in his accounts and I wanted to find out how much Larry, the owner of the store, had paid Mr. Gray, as he did not turn in his money."

XXX.

The Court erred in permitting the plaintiff's witness Eugene Harbinson to testify over the objection and exception of the defendant concerning a conversation between the proprietor of Economy Market in Menlo Park (referred to as "Carl") and the witness, as follows:

"Q. Now, when you went there, what occurred there, what conversation took place with Carl?

"Mr. Harrison: The same objection, if the Court please,—irrelevant, incompetent and immaterial, and hearsay.

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) I wanted to see his sales tag that Mr. Gray had given him on Friday, and we had some discussion as to why I wanted to see it, and he said I merely wanted to compare prices that Mr. Gray had quoted him on Friday. I said, 'No,' that I was checking Mr. Gray's route, that he was short in his accounts and had not turned any money in."

XXXI.

The Court erred in permitting the plaintiff's witness, Eugene Harbinson, to testify over the objection and ex- [44] ception of the defendant concerning a conversation between one referred to as "Joe" and the witness, as follows:

"Q. What conversation took place between yourself and Joe?

"Mr. Harrison: My objection may be deemed interposed to that conversation, may it, your Honor (that it is irrelevant, incompetent, and immaterial and hearsay and not authorized by the defendant)?

"The Court: Yes, overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) I asked him if I could see the sales tag for Friday that Mr. Gray had given him and that Mr. Gray was short in his accounts with the company. I wanted to find out how much money he had paid Mr. Gray."

XXXII.

The Court erred in permitting the plaintiff's witness, Eugene Harbinson, to testify over the objection and exception of the defendant concerning a conversation between one Mrs. Lightner and the witness, as follows:

"Q. Will you give us that conversation with Mrs. Lightner, please?

"Mr. Harrison: Same objection, if the Court please, (that it is irrelevant, incompetent, and immaterial and hearsay and not authorized by the defendant).

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) I asked her if I might look at the sales tag that Mr. Gray gave her on Friday to find out how much she had paid him as he had not turned in the money to Swift and [45] Company."

XXXIII.

The Court erred in permitting the plaintiff's witness Eugene Harbinson to testify over the objection and exception of the defendant concerning a conversation between one of the proprietors of Arjo's Market at Mayfield and the witness, as follows:

"Q. And give us the substance of that conversation with Arjo?

"Mr. Harrison: Same objection, if the Court please, (that it is irrelevant, incompetent, and

immaterial and hearsay and not authorized by the defendant).

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) I asked Arjo if I might look at the sales tag Mr. Gray had given him on Friday and he said, 'Why, yes,' and he came back and wanted to know why I wanted to look at it, and he said there was some trouble between Mr. Gray and the full line salesman, that they were always fighting for the business, and he wanted to know if I wanted to compare the prices, and I said no. I said Gray was short in his accounts and had not turned the money in to Swift and Company and I wanted to find out the amount."

XXXIV.

The Court erred in permitting the plaintiff's witness Eugene Harbinson to testify over the objection and exception of the defendant concerning a conversation between one of the proprietors of another market in Mayfield and the wit- [46] ness, as follows:

"Q. Give us the substance of the conversation that you had there in the market in Mayfield?

"Mr. Harrison: Same objection as heretofore interposed, (that it is irrelevant, incompetent, and immaterial and hearsay and not authorized by the defendant).

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) I told him that I wanted to see the sales tag [47] that Mr. Gray had given him on Friday, and he objected to that. So I told him that Mr. Gray was short in his accounts with the company and I wanted to find out how much he paid Mr. Gray as the money was not turned into the company."

XXXV.

The Court erred in permitting the plaintiff's witness Eugene Harbinson to testify over the objection and exception of the defendant concerning a conversation between Mr. Charles Gould and the witness, as follows:

"Q. Did Mr. Gould say anything other than you have told us at that conversation to you?

"A. Well we talked——

"Mr. Harrison: Object to that on the ground that the conversation between Gould and the witness would not be binding on the defendant.

"The Court: Objection overruled.

"Mr. Harrison: Exception.

"(Witness) Mr. Gould told me that he was going to check the entire territory and route as there was some other shortage came up prior to that Friday; and we discussed just in a general way that there were certain tickets missing, and that he couldn't quite understand it, but that he was sent out to check the territory."

XXXVI.

The Court erred in permitting the plaintiff's witness Emmett Arjo to testify over the objection and exception of the defendant concerning a conversation between Eugene [48] Harbinson and the witness, as follows:

"Q. What was the conversation?

"Mr. Harrison: Object to that if the Court please on the ground that it is hearsay, incompetent, irrelevant, and immaterial.

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) Mr. Harbinson asked to see my sales tag. I asked the reason for it and he said Mr. Gray had been accused of taking money from Swift and he was checking up to see how much I paid him. I replied, 'I'm sorry; I had no cash dealings with Mr. Gray,' that I had a weekly account."

XXXVII.

The Court erred in permitting the plaintiff's witness Fred Langbehn to testify over the objection and exception of the defendant concerning a conversation between Mr. Gould and the witness, as follows:

"(Witness) I had a conversation with Mr. Gould subsequent to the time Mr. Gray went on his vacation concerning Mr. Gray.

"Mr. Harrison: Just a moment. Are you asking for the conversation now, Mr. Welsh?

"Mr. Welsh: Yes.

"Mr. Harrison: We object to that, if the Court pleace, on the ground that it is irrelevant, incompetent and immaterial and hearsay.

"The Court: Overruled. Exception.

"Mr. Welsh: Q. Proceed, Mr. Langbehn.

"Mr. Harrison: No evidence of authority proved. [49] Exception.

"(Witness) Mr. Gould came in to check over bills of things we had bought from Swift and Company off their cold meat wagon. He asked if he could see the bills. I said he could but that we didn't have the bills in the store, that we had them at the house of Mr. Allen, my partner, a few blocks away. He said that he had a car and would take me out to Mr. Allen's house. I went up with him. On the way over there I had a conversation with him."

XXXVIII.

The Court erred in permitting the plaintiff's witness Fred Langbehn to testify, over the objection and exception of the defendant, concerning a conversation between Mr. Gould and the witness, as follows:

"Q. Just state what was said?

"Mr. Harrison: Same objection, if the Court please, (that it is irrelevant, incompetent, immaterial, hearsay and no authority proved).

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) He said the reason he would like to see the bills was it seemed Harry Gray had taken some of Swift's money just before he went on his vacation and they wanted to see just how much he had taken. Nothing more was said. When we arrived at the house, Mrs. Allen got out the bills, and Gould checked the bills we had there with the list he had in his little book. He checked the amounts and the bills with the totals in the books. [50]

XXXIX.

The Court erred in permitting the plaintiff's witness Fred Langbehn to testify over the objection and exception of the defendant concerning a conversation between Mr. Gould and the witness, as follows:

"Q. Did he make any other statements while he was going through the slips with reference to Mr. Gray?

"A. Yes, he said——

"Mr. Harrison: Same objection, (that it is irrelevant, incompetent, immaterial, hearsay and no authority proved).

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"A. He said it sure looked kind of bad for Harry because it was here the day before he was supposed to go on his vacation and his cash was missing."

XL.

The Court erred in permitting the plaintiff's witness Polly Guptill to testify over the objection and exception of the defendant concerning a conversation between Mr. Gould and the witness, as follows:

"Q. Just go on from there. What did he say?

"Mr. Harrison: In order that the record may be clear, we object, if the Court please, on the ground that it is immaterial, irrelevant and incompetent, and no authority proved; hearsay.

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) Mr. Gould asked to look over the receipts. I asked him why. He answered that the reason was that he was [51] sent out by Swift because Harry was short in his accounts, and he wanted to check up on his cash sales slips."

XLI.

The Court erred in permitting the plaintiff's witness Dorothy Hamilton Kipps to testify over the objection and exception of the defendant concerning a conversation between Mr. Gould and the witness, as follows:

"Q. Just state what was said.

"Mr. Harrison: Same objection as already stated in the case of the last witness, (that it

is immaterial, irrelevant and incompetent, and no authority proved; hearsay).

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) Mr. Gould came in and asked to look over the accounts, saying that there was a shortage and he wanted to see what Mr. Gray's accounts were with Swift. He stated that it was Harry Gray's accounts that were short."

XLII.

The Court erred in permitting the plainitff's witness Arnold Montemagni to testify over the objection and exception of the defendant concerning a conversation between Mr. Harbinson and with witness, as follows:

"Q. Did you have any conversation with Mr. Harbinson in October of 1934 concerning Mr. Gray?

"Mr. Harrison: That is objected to on the ground that is already stated with respect to the last witness (that it is immaterial, irrelevant and incompetent, and no authority proved; hearsay). [52]

"The Court: Overruled. Exception noted.

"Mr. Harrison: Exception.

"(Witness) About the time Mr. Gray went on his vacation, Mr. Harbinson took the route and came along and asked me if I could produce some sales tags for the previous week. [53] He

told me Mr. Gray was short in his accounts, that is, in collections, and he would like to check on it."

XLIII.

The Court erred in permitting the plaintiff Harry J. Gray to testify in response to a certain question over the objection and exception of the defendant, as follows:

"Q. Did you have any conversations with those customers as to what had been said about you while you were gone?

"Mr. Harrison: Object to that, if the Court please, on the ground that it is purely hearsay, irrelevant, incompetent, and immaterial, not binding on this defendant. A statement to the witness cannot be a publication; all that this testimony would tend to prove would be a disclosure to this witness, except in so far as it would be purely hearsay.

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) I asked them to show me the tags again. They were reluctant to do so because they had shown them to Mr. Gould and Mr. Harrison and thought they had it all straightened out. They were rather cold and indifferent and failed to give me any cooperation as far as finding out what I wanted to know. Some refused to show me the tags and some finally did. They wanted to know what

Swift & Company had charged me with and how much money I had gone south with, what I had done with the new car I bought with the money, and remarks of that type." [54]

XLIV.

The Court erred in permitting the plaintiff Harry J. Gray to testify in response to a certain question over the objection and exception of the defendant, as follows:

"Q. Give us the conversation with Mr. Hartl?

"A. I asked——

"Mr. Harrison: That is objected to on the ground that a statement to the witness can't be slander, if the Court please.

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) I asked if I could check through the tickets again, and he refused me, saying that the case was closed; that they wanted that check that I had given them once, and he says, 'As soon as you give us the check we will close this and forget all about it.' So I went to Mr. Kelly and asked if he wouldn't do something about it to help me, because no one was giving me any cooperation getting to the bottom of it. So he finally talked to Mr. Hartl, and Mr. Hartl consented that I could look through the tags again."

XLV.

The Court erred in permitting the plaintiff Harry J. Gray to testify in response to a certain question over the objection and exception of the defendant, as follows:

"Q. Mr. Gray, did you take any of this money that you collected on that Friday morning and keep it?

"Mr. Harrison: That is objected to on this ground: There is no claim in this case that this witness embezzled or [55] took the money; there is no attempt to defend on that ground. The claim is simply that the statement that he was short in his accounts was true. And we submit that it is wholly immaterial, whether or not he took the money.

"The Court: Overruled.

"Mr. Harrison: Exception.

"(Witness) No, sir, I never collected any money for Swift & Company and failed to turn it in."

XLVI.

The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning plaintiff's endeavors to obtain employment, as follows:

"Q. Who was the first meat company you applied to for employment?

"Mr. Harrison: That is objected to, if the Court please, on the ground that it is irrelevant, incompetent and immaterial and has no

connection with the slander charged. Now, there is no showing here and no showing has been attempted to be made that any disparaging remarks of any kind or character were made to any other employers. Counsel now is going into the question of what other employers may have done, and that will obviously open a very wide scope of inquiry.

"The Court: Overruled.

"Mr. Harrison: Exception.

"(Witness) I first applied for employment at the Virden Packing Company at its offices in South San Francisco, and I talked with the Sales Manager, whose name I don't recall."

[56]

XLVII.

The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning plaintiff's endeavors to obtain employment, as follows:

"Q. What was the conversation you had with the sales manager of the Virden Packing Company?

"Mr. Harrison: That is objected to as hearsay, incompetent, irrelevant and immaterial.

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) He told me to drop back in a day or two and he then told me that he had nothing for me."

XLVIII.

The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning plaintiff's endeavors to obtain employment, as follows:

"Q. Give us the conversation you had with that man at Cudahy's?

"Mr. Harrison: Same objection, if the Court please, irrelevant, incompetent, immaterial and hearsay.

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"A. I told him the experience that I had; that I wanted to stay in the meat business; that I was willing and had an education and quite a foundation in the meat business; that I thought I could do them some good. He was very much [57] interested in it. I dropped back in several days and spoke to him again, and he said that he didn't have anything for me."

XLIX.

The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning plaintiff's endeavors to obtain employment, as follows:

"Q. Give the conversation you had with the sales manager of Hormel Packing Company?

"Mr. Harrison: We object upon the same ground.

"The Court: Yes, overruled. Exception.

"Mr. Harrison: Exception.

"A. I told him about the same as I had told the other concerns, and he asked me to take this application and fill it out and he would talk to me, or I could just talk to the general manager when I came back. I filled out the application and came back and talked to either the sales manager or the general manager, either one of the two. On the first occasion, I don't remember whether it was the sales manager; it was one or the other; I talked to both men. I asked the second man if I should leave my application blank that I had filled out, and he said, 'No, I'm afraid we haven't any place for you.' "

L.

The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning plaintiff's endeavors to obtain employment, as follows:

"Q. What happened there? Give the conversation you [58] had with those people at Hickman Products Company.

"Mr. Harrison: My objection goes to this conversation, too, if the Court please.

"The Court: Yes, overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) I told him my experience down the Peninsula, that I had been running a truck

similar to the one that they had down there. I came back later and he said that they had nothing for me."

LI.

The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning plaintiff's endeavors to obtain employment, as follows:

"Q. Give the conversation at Zee and Zoe.

"Mr. Harrison: We object to the conversation on the grounds already stated.

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"(Witness) He told me he was considering three men, of whom I was one. He also asked me to come back the following day, and he would give me his answer. I came back the following day, but he said, 'I am sorry, Mr. Gray; we have given the job to someone else'."

LII.

The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning the plaintiff's endeavors to obtain employment, as fol- [59] lows:

"Q. Did you get employment at either Cudahy Packing Company or Houser Packing Company in Los Angeles?

"Mr. Harrison: Object to that on the ground that it is immaterial, remote and having no connection with the slander complained of.

"The Court: Overruled.

"Mr. Harrison: Exception.

"A. No, sir. I did not get employment after I left San Francisco until June, 1935."

LIII.

The Court erred in permitting the plaintiff Harry J. Gray to testify in response to a certain question over the objection and exception of the defendant, as follows:

"Q. What was your conversation with Mr. Hartl about the matter?

"Mr. Harrison: Object to that on the ground that it is irrelevant and immaterial.

"The Court: Overruled.

"Mr. Harrison: Exception.

"(Witness) I told Mr. Hartl that I had just come from interviewing Jack Hamilton down at his home near Santa Clara. And he asked me what Mr. Hamilton had said. I told him that I had accused Jack Hamilton point blank of being the man that framed me all along; that I wanted him to admit his guilt against me and straighten me out after he had caused all the trouble for me. Mr. Hartl said, 'Gray, what did he say?' I said, 'He just wouldn't admit it. He said he was on leave of absence and there was no trouble with Swift & Company.' [60] So Mr. Hartl said that he never believed that Hamilton was guilty of all that they had charged him with, because he was

one of his very best friends. I asked him to reimburse me with this money I so willingly paid when all this trouble arose. He said, 'Until Hamilton admits he stole it from you, we can't do a thing about it.' "

LIV.

The Court erred in permitting the plaintiff Harry J. Gray to testify in response to a certain question over the objection and exception of the defendant, as follows:

"Q. Give the conversation with Mr. Hartl?

"Mr. Harrison: My objection goes to this as irrelevant, incompetent and immaterial.

"The Court: Overuled. Exception.

"Mr. Harrison: Exception.

"(Witness) I asked him again if he would reimburse me and he said, 'Gray, it is entirely out of my hands. I would advise you to go to see Mr. Smart, our attorney.' "

LV.

The Court erred in permitting the plaintiff Harry J. Gray to testify in response to a certain question over the objection and exception of the defendant, as follows:

"Q. Did you go to see Mr. Smart?

"A. I went to Mr. Smart, Swift & Company's attorney, and told him, explained the case to him.

"Mr. Harrison: This is objected to, if the Court please, as immaterial.

"The Court: Overruled. [61]

"Mr. Harrison: Exception.

"(Witness) And Mr. Smart said that there was nothing that he could do but advised me to go and see Jack Hamilton's attorney, which I did."

LVI.

The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of the defendant, as follows:

"(Witness) I went to Jack Hamilton's attorney and demanded that he——

"Mr. Harrison: I object to this as dealing with a matter that obviously has no bearing on the controversy between this plaintiff and the defendant, if the Court please.

"The Court: Overruled.

"Mr. Harrison: Exception.

"Mr. Van Dyke: Go ahead.

"(Witness) I demanded of Jack Hamilton's attorney that he make up the money he had stolen from me, which he said he didn't know anything about. I in turn went to Redwood City where Hamilton was in jail."

Wherefore, the defendant Swift and Company prays that the judgment heretofore entered in favor of plaintiff Harry J. Gray and against the defend-

ant be corrected and reversed, and for such other and further relief as to the Court may seem just and proper.

Dated: April 1, 1938.

MAURICE E. HARRISON
T. L. SMART
MOSES LASKY
BROBECK, PHLEGER & HARRISON
Attorneys for Defendant

[Endorsed]: Filed Apr. 1, 1938. [62]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING ASSIGNMENT OF ERRORS

State of California,
City and County of San Francisco—ss.

George Helmer, being first duly sworn, deposes and says:

That he is a citizen of the United States and a resident of the City and County of San Francisco, State of California; that he is over the age of 18 years and not a party to the above entitled cause;

That Messrs. Brobeck, Phleger & Harrison and T. L. Smart, Esq., the attorneys for the defendant, have their offices in the City and County of San Francisco, State of California; that John M. Welsh, Esq. and Messrs. Butler, Van Dyke & Harris, the attorneys for the plaintiff, have their offices in the

County of Sacramento, State of California, in the capital National Bank Building in the City of Sacramento;

That on the first day of April, 1938, in the City and County of San Francisco, affiant deposited in the United States Mail a sealed envelope, with postage thereon fully prepaid, addressed to John M. Welsh, Esq. and Messrs. Butler, Van Dyke & Harris, Capital National Bank Building, Sacramento, California; that said envelope contained a copy of the attached Assignment of Errors; that there is a daily service by United States mail at [63] the place so addressed and that there is a regular communication by mail between said place of mailing and the place so addressed.

GEORGE HELMER

Subscribed and sworn to before me this first day of April, 1938.

[Seal] EUGENE P. JONES

Notary Public in and for the City and County of San Francisco, State of California. [64]

[Title of District Court and Cause.]

COST AND SUPERSEDEAS BOND ON APPEAL

Know All Men by These Presents:

That we, Swift and Company, a corporation, as Principal, and Maryland Casualty Company, a corportion, duly incorporated under the laws of the

State of Maryland and having the power to execute bonds and undertakings in judicial proceedings and duly authorized to transact a general surety business within the Northern District of California, as Surety, are held and firmly bound unto Harry J. Gray in the full and just sum of Twenty-five Hundred ($2500.00) Dollars, to be paid to the said Harry J. Gray, his executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 2nd day of April, 1938.

Whereas, lately at a District Court of the United States for the Northern District of California in a suit pending in said Court, between Harry J. Gray, plaintiff, and Swift and Company, a corporation, defendant, a judgment was rendered against the said Swift and Company for the sum of $1750.00, plus costs, and the said Swift and Company having filed its petition for an appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and said appeal having been allowed by order of the above-entitled Court, to [65] reverse the judgment in the aforesaid suit, and a citation having been directed to the said Harry J. Gray citing and admonishing him to be and appear in a United States Circuit Court of Appeals for the Ninth Circuit to be held at San Francisco, in the State of California; and

Whereas, Swift and Company desires, during the progress of such appeal, to stay the execution of the judgment of the District Court;

Now, the condition of the above obligation is such, that if the said Swift and Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

The undersigned and each of them do jointly and severally agree that in case of a breach of any condition of the above obligation the above-entitled Court may in the above-entitled matter upon notice to said Maryland Casualty Company, the Surety named herein, of not less than ten (10) days, proceed summarily in the above-entitled action to ascertain the amount which said Surety is bound to pay on account of said breach and render judgment therefor against it and award execution therefor.

SWIFT AND COMPANY
By T. L. SMART
Its Attorney in Fact
as Principal

[Seal] MARYLAND CASUALTY COMPANY
By W. G. KELSO
Its Attorney in Fact
as Surety [66]

The form and amount of the bond and sufficiency of the surety approved this 4th day of April, 1938.

A. F. ST. SURE
United States District Judge [67]

State of California,
City and County of San Francisco—ss.

On the 2nd day of April in the year One Thousand Nine Hundred and thirty eight, before me, Kathryn E. Stone, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared T. L. Smart known to me to be the person whose name is subscribed to the within and annexed instrument, as the Attorney in fact of Swift and Company and acknowledged to me that he subscribed the name of Swift and Company thereto as principal and his own name as Attorney in fact.

In Witness Whereof, I have hereunto set my hand, and affixed my official seal, at my office, in the said City and County of San Francisco, the day and year last above written.

[Seal] KATHRYN E. STONE
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires March 1, 1941. [68]

State of California,
City and County of San Francisco—ss.

On this 2nd day of April in the year one thousand nine hundred and thirty-eight before me, Antonio M. Cogliandro, a Notary Public in and for the City and County of San Francisco, personally appeared W. G. Kelso, known to me to be the Attorney-in-Fact of the Maryland Casualty Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal at my office in the City and County of San Francisco the day and year in this certificate first above written.

[Seal] ANTONIO M. COGLIANDRO
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires Dec. 31, 1938. [69]

AFFIDAVIT OF MAILING COST AND SUPERSEDEAS BOND

State of California,
City and County of San Francisco—ss.

George Helmer, being first duly sworn, deposes and says:

That he is a citizen of the United States and a resident of the City and County of San Francisco,

State of California; that he is over the age of 18 years and not a party to the above-entitled cause;

That Messrs. Brobeck, Phleger & Harrison and T. L. Smart, Esq., the attorneys for the defendant, have their offices in the City and County of San Francisco, State of California; that John M. Welsh, Esq. and Messrs. Butler, Van Dyke & Harris, the attorneys for the plaintiff, have their offices in the County of Sacramento, State of California, in the Capital National Bank Building in the City of Sacramento;

That on the 2 day of April, 1938, in the City and County of San Francisco, affiant deposited in the United States mail a sealed envelope, with postage thereon fully prepaid, addressed to John M. Welsh, Esq. and Messrs. Butler, Van Dyke & Harris, Capital National Bank Building, Sacramento, California; that said envelope contained a copy of the attached Cost and Supersedeas Bond; that there is a daily service by United States mail at the place so addressed and that there is a regular communication by mail between said place of mailing and the place so addressed.

GEORGE HELMER

Subscribed and sworn to before me this 2nd day of April, 1938.

[Seal] EUGENE P. JONES

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Apr. 4, 1938. [70]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be it remembered that on March 1, 1938, at a term of the United States District Court for the Northern District of California, Southern Division, the above-entitled cause came on for trial before the Honorable A. F. St. Sure and a jury; and the following proceedings took place. Thereupon [71] a jury was impaneled and sworn, and the trial commenced on said first day of March 1938, and continued on the second, third, and fourth days of March, 1938.

Messrs. Butler, Van Dyke & Harris, by Benjamin F. Van Dyke, Esq., and John M. Welsh, Esq. appeared for the plaintiff; and Messrs. Brobeck, Phleger & Harrison, by Maurice E. Harrison, Esq., and Moses Lasky, Esq., and T. L. Smart, Esq. appeared for the defendant.

Thereupon the plaintiff called

HARRY J. GRAY,

the plaintiff, as a witness on his own behalf, and he testified as follows:

Direct Examination

I am 28 years old. I first went to work for Swift and Company in 1933. I had finished 3 years of education at the University of Arizona. Until October of 1933 I worked in various departments in the plant at various manual labor jobs. In October, 1933, I became a sausage truck route driver, on the

(Testimony of Harry J. Gray.)

South San Francisco to Palo Alto route, and stayed on that route for the rest of my employment with Swift and Company.

My job was to call on the different markets in the different towns with a stock of bacon, sausages, etc. on the truck, and sell the material right from the truck.

I would order my material each day from the order clerk for the next day. The plant would make up the order and place that material on my truck. I would check it in the morning to see if everything was there. Then I would start on the route. I had a sales book in which I marked each [72] customer's name, address, the different materials sold, and the amount of the purchase. If it was a cash paid account, I marked paid on the slip. These entries were made in triplicate. One copy was left with the customer. With respect to what I turned into the company, I would tear out the charge tags and leave them with the department that checked up on all charge accounts. As for the cash sales, I would make a tabulation in a cash collection book, by towns, showing customers, dates, articles bought, and amounts collected, each town on a separate sheet. Then I would turn in the cash tags from the sales book together with the cash collection book and my money. The cashier, Mr. Hamilton, would receive the money the following day and stamp the amount paid on the cash collection book and return the book to me as my voucher that I had turned in the

(Testimony of Harry J. Gray.)

money. Hamilton was cashier all the time I was there.

With respect to the time when I turned in the cash I had collected, I came back each day and got to the plant at 7:30 p. m. or 7:45 p. m. and there was no one in the office except an order clerk. I would give him my order for the next day to replenish my stock. As there was no one there who would give me a receipt, I took the money home, would make up my reports, and the following morning I would come back to the office and throw that money inside the cashier's cage. The only one there at night was an order clerk and he would not give me a receipt. The cashier would not be there in the morning when I arrived. He did not arrive until 8 a. m., and as I had to be out by 7:30 or 7:45 a. m., I could not wait for him to get my receipt, and that was the reason I had been leaving it in the cage and getting the receipt the following day. I followed this practice some six or seven months. [73]

The question of shortage arose first on the Saturday afternoon as I was getting ready to leave on my vacation, with respect to my Friday receipts which I had collected the day before and turned in Saturday morning. I came into the office Saturday morning about 7:15 or 7:20 and left the money as I had been doing for the past 6 or 7 months, back in the corner of the cashier's cage. I always came in and stuck my arm back of the cubby hole and

(Testimony of Harry J. Gray.)

threw it away back in the corner where it was not possible for anyone to reach it and drag it out.

The cashier's cage was built up about waist high with boards and inside was a shelf that they worked off of and on top of the shelf began the cage which was a big wire screen completely around it with the door always locked. The screen ran some four or five feet above the counter itself. On two sides there were cubby holes where the cashier does his transactions with people that come up to the cage. The screen ran to maybe three or four feet from the ceiling and the cage was completely enclosed on all four sides. It was about 15x12 feet.

The bundle which I tossed into the cage on Saturday morning contained my cash collections for Friday to the extent of about $60. There was one check and the rest was in paper or silver. There were also the tags and a number of tickets.

After throwing the bundle in on Saturday morning, I went out on my truck and picked up Mr. Harbinson, and we went down the Peninsula selling our customers. Mr. Harbinson had been with me for two days previous. I was taking him around introducing him to the customers, because I was leav- [74] ing on a vacation for two weeks, and he was taking my place. I had made my arrangements with the company for my vacation.

We came in from the route on Saturday about 12:30, checked our merchandise in the plant and went back across the street and made up our re-

(Testimony of Harry J. Gray.)

ports and returned to the plant about 1:30 that Saturday afternoon. I came in, left my receipts and cash from the day before and a couple of reports that my sales manager had asked me to leave before I left. I was heading out the door on my vacation when Jack Hamilton, the cashier, stopped me and said, "Gray, where is your cash collection book for Friday? I did not get it this morning." I said, "Jack, you must have got it. Don't tell me that. I am going on a vacation, don't wreck my vacation by telling me something like that." He said, "No, I did not get it." I said, "It must be there, I left it there this morning."

We went up and ransacked the cage and looked in the wastepaper basket. Harbinson and I went up on the counter and looked up on top of the cage to see if the dirt or dust had been disturbed or any fingerprints, but it was all heavily coated with dirt and dust. While this was going on there were present Mr. Jack Hamilton, the cashier, Mr. Irving Everett, the assistant sales manager, Mr. Gene Harbinson, and myself. Mr. Irving Everett was assistant sales manager, but Mr. Frank Kelly was the regular sales manager. Mr. Kelly was in Chicago and in his absence Mr. Everett was in charge of the sales department,—in other words, my boss.

Mr. White was the general manager of Swift and Company on the Pacific Coast and in charge of our plant in South San Francisco. Mr. Hartl is in charge of the office employment there of the South San Francisco plant. [75]

(Testimony of Harry J. Gray.)

That Saturday afternoon after we had looked up on the cage, we continued to look around the office to see if we could not possibly find some remnants of tickets or cash collection book that I had turned in. Mr. Hamilton said that he had not found my cash collection book in the cage that morning. Then he said that the cashier's cage had been locked and he could not understand how anybody could have gotten money out of there. So I told Mr. Everett that I knew the approximate amount of the money that had been collected and that I would make out a list of this amount and leave it with him. I told him that I had a week's wages coming and a check of a week that they were giving me for a vacation, and that would more than cover the amount that had been stolen out of the cashier's cage that morning. I told him that I had planned on my vacation for some months and that I wanted to go, but I did not think there was anything else that I could do, and he said it was perfectly all right, to go ahead, that he felt they would find the money, that things would straighten out, and it would cheer me up on my vacation. I told Mr. Everett that I had taken the money in that morning before I left, as I had been doing for the past six or seven months and I could not understand why Mr. Hamilton had not received it that morning. The possibility of someone taking it out of the cage was rather remote, but I knew that I had left it there and that it should be there.

(Testimony of Harry J. Gray.)

I made out a complete list of all the people I had collected from and the approximate amount I had collected. I told Mr. Everett that it was within a few dollars of the exact amount I had collected the day before. The total I showed was approximately $60. This list I made out showed the [76] name of the customer, the town the customer had an establishment in, and the amount of merchandise that he had purchased from me.

No further conversation then took place; I then left the plant for my vacation.

I returned Sunday two weeks later. I expected to go back on my job Monday morning, but was informed by Mr. Harbinson, who had taken my place, that I was to report to the office Monday morning. I did that and was received by Mr. White, the general manager, Mr. Frank Kelly, who had returned from Chicago, Mr. Irving Everett, the assistant sales manager, and Mr. Jack Hamilton, the cashier. Outside of myself, that was all who were there.

"Q. Now, give us the conversation as near as you can that occurred when you went there and met those gentlemen?

"Mr. Harrison: We object to the conversation on the ground, if the Court please, that any discussion between the corporate officers and the plaintiff was not a publication and cannot be relied upon as a slander.

"The Court: Overruled.

"Mr. Harrison: Exception."

(Testimony of Harry J. Gray.)

(Witness resuming) I asked what this was all about, why they had me in there, and why I did not go back on my job. Mr. Hartl said, "Gray, besides that money that was missing the day you left and knew about, we have some twenty or twenty-one other tickets that date as far back as three weeks before you left that have never been turned in. We have it in black and white against you." Mr. White asked me what I had to say about it, and I said, "Well, gentlemen, there isn't anything I can say. I assure you that I have been honest and above board about [77] everything and I know nothing about what has taken place, except that I know the money was stolen the Saturday I left on my vacation."

Then Mr. Kelly, the sales manager, showed me five sales tickets that had the numbers torn off of the corners. He said, "Gray, this looks like a buildup for something bigger, something that has happened right now. How can you explain this?" I said, "You must be crazy, that is just a case of the number not being torn off where the paper was perforated."

They asked me what I intended to do about it all. They said that they had wired Chicago and that I was suspended from the company; that either I make up the deficit against me or I would be turned in to the bonding company. I said, "Well, gentlemen, you cannot stick this on me until you have given me an opportunity to prove my innocence.

(Testimony of Harry J. Gray.)

You haven't got anything on me." Then Mr. Hartl said, "Gray, we have it in black and white. We have tickets that are missing right out of the middle of your sales book; for example, 7 and 9 and the ticket number 8 is missing; we have it in black and white. We have it cold." I said, "Mr. Hartl, if you can prove that to me, I will admit that I am guilty, but if you cannot prove that statement and if you let me look in the files, I can show you that you are wrong."

They claimed that they had looked through the files and found every bit of evidence that they wanted; that I could not find anything, and that it would do me no good, and that I did not know anything about their books. I said, "I know that, but give me an opportunity to prove myself. I have to do something."

So they took me into the room where they kept their [78] receipts and let me look through the tags of collected money that had been stored. I said, "I have a lead and I am going to try and work on it and try to find something in black and white and prove my innocence." Mr. Hartl asked me who I thought it was and I said "I will prove that to you later." I took the numbers of all these missing tickets, and proceeded to go down the Peninsula to see if I could find some information that would help me clear myself. I talked to the customers and after investigating I came back to the plant. Mr. Hartl said, "Gray when are you going to make out that

(Testimony of Harry J. Gray.)

check for the shortage. We want to close this case and get it off our hands and forget all about it."

I told him I thought that was admitting guilt, if I wrote out a check and that I did not want to do it. He said that if I did not write out the check I would be blacklisted with the bonds company and could not get a job anywhere. I made out the check to Swift and Company and left it with Mr. Hartl. Later I came back to the plant and told Mr. Hartl that I had stopped payment on the check, that I thought I was wrong when I gave it to him, and that I wanted to let him know about it because I did not want him to feel that I had done something wrong without him knowing about it.

After investigating down the Peninsula for a few days, I came back in and wrote another check. I gave it to Mr. Hartl and Mr. White. Then I asked if I got my job back, that after all what they wanted me to do was to clear up this deficit; that if I straightened that up I naturally expected to go back on the job. Mr. White said, "I will speak to Kelly and your manager about it, the sales manager."

They came back and Mr. White told me that they did not have anything for me; that I could not go back on the job. [79] I told him that I was positive I knew who had taken this money; that if he would let me explain it to him, I could convince him that there was a guilty man in their midst somewhere. He said, "Gray who is it?" I replied, "It is Jack

(Testimony of Harry J. Gray.)

Hamilton, the cashier." Mr. White said, "Gray, I would not even listen to your story. Mr. Hamilton has been with Swift and Company for eighteen years, a trusted employee, I won't hear a thing about it." I asked Mr. White if there was another sales job I could go back on and he said, "No." I asked if there was any other job I could have, and they said, "No," they had nothing for me.

"Mr. Van Dyke: Q. Now, Mr. Gray, after you left Swift and Company's place of business, after this last conversation, what did you do with regard to seeking employment?

"Mr. Harrison: Now, this, I presume is offered for the purpose of showing a transaction between this witness and other persons with whom he sought employment. We object to that testimony on the ground that it is wholly incompetent, irrelevant and immaterial; it is not shown to have any connection with the alleged slanderous statements until proof is offered by these other persons the statement was made. It is hearsay testimony, and has no connection with the slander charged in the complaint.

"The Court: Overruled.

"Mr. Harrison: Exception.

"A. I went to Virden Packing Company and asked for employment. That is the first place I went to."

Thereupon a discussion occurred and the plaintiff was withdrawn from the witness stand, temporarily. [80]

Thereupon

J. E. HARBINSON

was called as a witness on behalf of the plaintiff and testified as follows:

Direct Examination

I live in Sacramento; my occupation is sheep and cattle raising. From June, 1934 to February, 1936 I worked for Swift and Company in South San Francisco. I know the plaintiff Harry Gray. I have known him since about two weeks after I started working for Swift. On Monday, October 15, 1934, I took over the route wagon that he had been driving. I went out three days prior to that time on the wagon with Mr. Gray. The route was from South San Francisco to Mayfield. We called on approximately eight towns. I had received my instructions to go upon the wagon with Mr. Gray from Mr. Kelly, the sales manager. Those instructions were to learn the route with Gray and to take over the truck on Monday. I went on the truck with Gray and met the customers on the route, being introduced to them by Mr. Gray. Mr. Kelly stated that the reason I was to take over the truck was that Gray was going on his vacation. He told me I was to take it over while Gray was gone.

On the Saturday preceding the Monday on which I took over the truck, I was present at a conversation at the office of Swift and Company concerning some cash receipts that Gray was supposed to have collected. Hamilton, the cashier, Mr. Everett, the

(Testimony of J. E. Harbinson.)

assistant sales manager, Harry Gray and I were those present. It came about in the following way: On coming back to the plant on Saturday afternoon around one or one-thirty, we went to the office to turn in our tags and pick up the mail. On the way up, Mr. Hamilton asked Mr. Gray [81] where his collections were for Friday. That started the conversation. Gray stated he was positive that he placed the envelope which contained the sales tags and money in the cashier's cage. Hamilton said nothing about it except that he had not received it.

We looked all through the cashier's cage and could not find it any place whatsoever. We looked all over the office, went through all the wastepaper baskets and looked up on the cashier's cage and could find no trace of anyone going over it, and then Gray and I went back to the hotel in which we lived. And we met Mr. Gould, an employee of Swift. He was at that time what they would call a relief salesman. We looked all through the room in which Gray lived for this envelope. I was with Gray the night before when he made up all his cash receipts. I had last seen the envelope when Mr. Gray left for the office Saturday morning, but I did not go with him to the office. I had seen him make it up, and I saw him leave with the envelope.

After we had looked through the room, Mr. Gould, Mr. Gray, and I went back over to the office and there talked with Mr. Everett and Mr. Hamilton. The substance of the conversation concerned the

(Testimony of J. E. Harbinson.)

loss of the money, that it was not turned in. Mr. Gray was leaving on a vacation, and he asked Mr. Everett if it was all right for him to go, that he had sufficient amount of money coming and that he would make up the shortage if it could not be found.

Mr. Gray made up a list with names of the customers whom he had called on on Friday and the approximate amount that he could recall, and he gave this list to Mr. Everett. Mr. Everett said it was all right for him to go on his vacation. [82] That was all that occurred that I can recall, except just a general conversation about the money.

I next contacted the matter on Monday morning. I talked with Mr. Everett then. I went to him because on Saturday before I left there, he told me to report to him Monday morning. At the conversation on Monday morning with Mr. Everett, he gave me the list which Gray had prepared and said, "I want you to go out and check on this shortage."

I went out on my route that morning with the list, and I talked with the customers whose names were on the list.

I do not recall the name of the first person I called upon on that list. It was the Los Angeles Fruit Market on Broadway in Burlingame. I talked with the lady who owns the market.

"Q. Will you just give us the conversation you had with the lady who owned the market?

"Mr. Harrison: That is objected to on the ground that it is hearsay, not binding upon this defendant.

(Testimony of J. E. Harbinson.)

"The Court: What is the purpose, Mr. Van Dyke?

"Mr. Van Dyke: To prove the slander.

"Mr. Harrison: We submit it does not show any authority in this witness, so the words spoken by him would not be within the scope of his authority to bind the company.

"The Court: Objection overruled.

"Mr. Harrison: Exception.

"The Court: Yes, exception noted."

(Witness resuming) I went in and asked this woman if I could see the sales tags which Gray had given her on Friday. After some discussion as to why she wouldn't let me see it, I told her that Mr. Gray was short in his accounts with the [83] company; that I wanted to find out how much she had paid Mr. Gray on Friday. There was no further conversation with her other than arguing with her over the fact that she thought I was trying to compare prices. There was no further conversation with respect to what I told her I was there for. She gave me the tag.

I next went to see a meat market in San Mateo called "Al Monte's Meat Market." I there talked with one of the owners whom I just knew as "Al."

"Q. All right. Now, will you please give the conversation you had with the man at Monte's Market that you called Al?

"Mr. Harrison: Object to that, if the Court please, on the ground that it is irrelevant, incompe-

(Testimony of J. E. Harbinson.)

tent, and immaterial and hearsay and not authorized by the defendant.

"The Court: Overruled.

"Mr. Harrison: Exception."

(Witness resuming) I went in and asked him if I could see the sales tag that Mr. Gray had given him on Friday. He said that he did not have it with him, and he wanted to know why, and I said I was out checking Mr. Gray's route, that he had been short in his accounts with the company and that I wanted to find out the amount he had paid. So he went home and got his receipt. I waited in the market till he came back, and he gave me the receipt, and he said that he had paid by check and that he would notify the bank to stop payment on the check.

I have given all the conversation that I can remember that I had with this gentleman called Al.

I next went to a small grocery store just outside of San Mateo and talked with the owner who was a young fellow whose [84] name was Larry. I don't know whether that was his first name or his last name. I do not know the name of the store, but it was just about a mile out of San Mateo.

"Q. Now, give us the conversation with Larry?

"Mr. Harrison: Same objection already stated, (that it is irrelevant, incompetent, and immaterial and hearsay and not authorized by the defendant).

"The Court: Yes, overruled. Exception.

"Mr. Harrison: Exception."

(Testimony of J. E. Harbinson.)

(Witness resuming) I said that I wanted to see the sales tag Mr. Gray had given him on Friday. There was some discussion as to why I wanted to see it, and I told him that Mr. Gray was short in his accounts and I wanted to find out how much Larry, the owner of the store, had paid Mr. Gray, as he did not turn in his money.

I next went into the Economy Market in Menlo Park and talked to the owner of the store whom I only knew as Carl. It may have been a Carl Feltman or Fieldman.

"Q. Now, when you went there, what occurred there, what conversation took place with Carl?

"Mr. Harrison: The same objection, if the Court please,—irrelevant, incompetent, and immaterial, and hearsay.

"The Court: Overruled. Exception.

"Mr. Harrison: Exception."

(Witness resuming) I wanted to see his sales tag that Mr. Gray had given him on Friday, and we had some discussion as to why I wanted to see it, and he said I merely wanted to compare prices that Mr. Gray had quoted him on Friday. I said, "No," that I was checking Mr. Gray's route, that he was short in his accounts and he had not turned any money in. [85]

I then called on another market in Palo Alto and three more in Mayfield. There was a small delicatessen where there was a young boy named Joe who was running the business for his mother at Palo

(Testimony of J. E. Harbinson.)

Alto. I do not know his last name. I talked to Joe.

"Q. What conversation took place between yourself and Joe?

"Mr. Harrison: My objection may be deemed interposed to that conversation, may it, your Honor, (that it is irrelevant, incompetent and immaterial and not authorized by the defendant)?

"The Court: Yes, overruled.

"Mr. Harrison: Exception."

(Witness resuming) I asked him if I could see the sales tag for Friday that Mr. Gray had given him and that Mr. Gray was short in his accounts with the company. I wanted to find out how much money he had paid Mr. Gray.

Then at Mayfield I went to Mrs. Lightner's Corner Delicatessen and talked to Mrs. Lightner herself.

"Q. Will you give us that conversation with Mrs. Lightner, please?

"Mr. Harrison: Same objection, if the Court please, (that it is irrelevant, incompetent and immaterial and hearsay and not authorized by the defendant).

"The Court: Overruled, Exception.

"Mr. Harrison: Exception."

(Witness resuming) I asked her if I might look at the sales tag that Mr. Gray gave her on Friday to find out how much she had paid him as he had not turned in the money to Swift and Company.

The parties to these conversations I had were all on my regular route that I called on Friday and

(Testimony of J. E. Harbinson.)

the previous day or [86] two with Mr. Gray. I was driving the wagon on that route on Monday. These conversations which took place were with people that I was calling on and getting their orders and selling them at the same time out of the wagon.

I went to Arjo's Market at Mayfield and talked with one of the Arjo boys.

"Q. And give us the substance of that conversation with Arjo?

"Mr. Harrison: Same objection, if the Court please, (that it is irrelevant, incompetent and immaterial and hearsay and not authorized by the defendant).

"The Court: Overruled. Exception.

"Mr. Harrison: Exception."

(Witness resuming) I asked Arjo if I might look at the sales tag Mr. Gray had given him on Friday and he said, "Why, yes," and he came back and wanted to know why I wanted to look at it, and he said there was some trouble between Mr. Gray and the full line salesman, that they were always fighting for the business, and he wanted to know if I wanted to compare prices, and I said, "No." I said Gray was short in his accounts and had not turned the money into Swift and Company and I wanted to find out the amount.

I went to another market in Mayfield but do not know the market or the name of the person to whom I talked. He was part owner and was someone we had dealt with on Friday.

(Testimony of J. E. Harbinson.)

"Q. Give us the substance of the conversation that you had there in the market in Mayfield?

"Mr. Harrison: Same objection as heretofore interposed, (that it is irrelevant, incompetent, and immaterial and hearsay, and not authorized by the defendant). [87]

"The Court: Overruled, exception.

"Mr. Harrison: Exception."

(Witness resuming) I told him I wanted to see the sales tag Mr. Gray had given him on Friday, and he objected to that. So I told him that Mr. Gray was short in his accounts with the company and I wanted to find out how much he paid Mr. Gray as the money was not turned into the company.

I called on all these people on Monday. They are all that I can recall that I did call on that day. I returned from my route that day, but I had no conversation with Mr. Everett concerning the results of that day's work. I went out again on Tuesday. I had not on Monday seen all of those who were on the list.

Most of the parties I called on Tuesday were charge accounts where no money had been paid, the sales being on credit. I continued on this route inquiring about the Friday sales until about Tuesday noon when I met Mr. Gould, who was at that time a relief salesman. I believe I met him in San Mateo while I was out on the route. This was before I had finished checking the sales tags. Mr. Gould said he was sent out by Mr. Hartl to check the entire terri-

(Testimony of J. E. Harbinson.)

tory. I then ceased my investigation. The list that I had I put on Mr. Everett's desk Tuesday night.

"Q. Did Mr. Gould say anything other than you have told us at that conversation to you?

"A. Well, we talked——

"Mr. Harrison: Object to that on the ground that the conversation between Gould and the witness would not be binding on the defendant.

"The Court: Objection overruled. [88]

"Mr. Harrison: Exception."

(Witness resuming) Mr. Gould told me that he was going to check the entire territory and route as there was some other shortage came up prior to that Friday; and we discussed just in a general way that there were certain tickets missing, and that he couldn't quite understand it, but that he was sent out to check the territory.

Cross Examination

I went to work for Swift and Company in June, 1934.

Between June, 1934 and October, 1934 I was working in the plant. I was living at the Stockyards Hotel which is across the road from the office of Swift and Company in South San Francisco. Some of Swift and Company's employees stayed there. From June to October, 1934, I was rooming with Harry Gray as his roommate, and I got to know him quite well.

(Testimony of J. E. Harbinson.)

I was on friendly terms with him and went out with him socially. I had a friendly feeling toward him.

I had been out on the route with Mr. Gray on Thursday, Friday and Saturday, October 13. We arrived at the office on Saturday around one-thirty and then occurred the discussion to which I have already testified. At that discussion Mr. Gray asked Mr. Everett if he could go on his vacation, saying there was enough money coming to him to take care of the shortage and that he would make up the shortage. That was Mr. Gray's expression at the time. At that meeting in the office there, Mr. Gray wrote out that list in his own handwriting. He told Mr. Everett that he could take this list he had prepared in order to check with the amount that was short. In other words, he told Mr. Everett that he was willing to make [89] up the shortage and that he had prepared this list of customers he had called on so that a check could be made on the amount of the shortage. That was the substance of it. At that time, on Saturday, October 13, I was very much interested in helping Gray out; I was friendly with him and I believed in him. At that time I believed that Gray was honest. At one time there was a doubt in my mind when Mr. Gould told me of this other case, but at least up to Tuesday noon, October 16, 1934, I believed him absolutely honest.

I never told anybody he was dishonest.

(Testimony of J. E. Harbinson.)

I never said to anybody anything in substance or effect that he was dishonest or crooked at any time prior to October 16, 1934 or at any other time.

In other words, I never said to anyone in substance that Harry Gray had embezzled money.

I cannot recall the names of anyone to whom I spoke on Tuesday. On Monday I had this list that Gray had prepared for the purpose of being check, and when I came to one of those people I would ask him for his Friday sales tag.

I never volunteered anything about the reason why I was there asking unless they objected or asked why I was requiring the sales tag. It was only in response to their questions as to why I wanted the sales tag that I referred to the shortage. I don't believe anyone on whom I called gave me sales tags without raising any objection about why I wanted it.

I have mentioned all the people to whom I spoke on Monday as far as I can remember. When they asked me why I wanted the sales tag, I told them that Mr. Gray had this shortage in the accounts.

I cannot remember any other statements which I made [90] to them on that subject other than the mere statement that this shortage existed.

And that is also true clear down to Tuesday noon of October 16, 1934, when I abandoned this checking entirely when I found that Mr. Gould was doing the work.

(Testimony of J. E. Harbinson.)

It is true that on Saturday afternoon Mr. Gray knew I was going to take his place on the route during his vacation. He knew that when he wrote out this list.

I had an interview with Charles P. Gould and M. P. Hogan at Sacramento on December 3, 1936. Mr. Hogan told me that he was investigating this case for Swift and Company and the three of us had a conversation in a place in Sacramento where food and drinks were served. Mr. Hogan asked me to sign a statement, and I said I would prefer not to sign a statement. Mr. Hogan asked me about my knowledge of the case. And he took down on paper a statement which he wrote. I saw the statement and had an opportunity to read it but did not do so. He was writing out this statement at the table as he was talking to me and as I was answering the questions. The paper which you show me looks very similar to the one that Mr. Hogan had and might be the one. Mr. Hogan was drinking quite heavily. When Mr. Hogan handed the statement to me I told him I wouldn't sign any statement. I don't know that I objected to any of the statements contained in the paper. I had an opportunity to read it, and I knew he was trying to find out the facts for Swift. I answered his questions with respect to this very matter, and I knew he was trying to take down some sort of an account of what I was saying.

Thereupon the document referred to was marked Defendant's Exhibit A for identification. [91]

(Testimony of J. E. Harbinson.)

(Witness resuming) On that occasion in the presence of Mr. Hogan and Mr. Gould, I stated: "My name is Eugene Harbinson and I live at 916 Mission Way. I am 27 years of age and at the present I operate my father's ranch in Yolo County. I was employed by Swift and Company in July, 1934 until February, 1936. During this time I became acquainted with Harry Gray and Charles Gould. I roomed with them about four or five months. About one week before Harry Gray went on his vacation in October, 1934, I was sent out on the route with Harry to learn the route and his customers." I did not state, "On October 13, 1934, Mr. Gray advised me he was short in his accounts as the cashier, Mr. Hamilton, told him his money had not been accounted for." I did not say, "Gray made up a memorandum and gave me regarding his collections and told me to see the customers and find out the amounts paid." I did say to Mr. Hogan and Mr. Gould, "My conversation with Gray was on Saturday afternoon, and on the Monday morning following I went out on Gray's route. I remember the L. A. Market in which I asked for the tickets, and the lady asked me why I wanted them, and I told her Gray was short and I wanted to find out the amount." I did not say, "I recall Gray giving me a list of places to call on and find out the amounts. I called on several customers and checked their bills, and in each case what I told them was that I was checking accounts of Gray as he was on his

(Testimony of J. E. Harbinson.)

vacation and was short. I recall that Gray said to me that whatever the outcome was to wait until he came back."

I was present listening and taking part in the conversation on Saturday when Mr. Gray told Mr. Everett to wait until he came back whatever the outcome might be and whatever he might find out. [92]

Mr. Gould was present on that afternoon besides Mr. Hamilton, Mr. Everett, myself and Mr. Gray.

In nothing that I said that Monday morning and Tuesday morning on October 15 and 16 did I have any desire to hurt Mr. Gray or injure his reputation.

At this conversation with Mr. Gould and Mr. Hogan in Sacramento they asked me if I wanted something to eat. Mr. Hogan was writing on the paper while asking me the questions and while I was answering them, and when he was finished I said I wouldn't sign any statement. He handed me the paper, but I refused to read it. I didn't even read it. I told him that if Swift and Company wanted to see me I would be perfectly willing to go down and see them. I told him the true account of the situation at the time and answered his questions.

Redirect Examination

The reason I wouldn't sign this statement is that when we started the conversation, I told him I wouldn't sign any statement regarding this case. The conversation then took place and about an hour transpired before the request was made to me to

(Testimony of J. E. Harbinson.)
sign the statement. Drinks were being served during that time. I did not take any. Mr. Hogan did. I couldn't say how many he took. I would say that he seemed to act and talk under the influence of liquor.

Recross Examination

Mr. Gould was not under the influence of liquor, but I would not say he was sober.

There was no doubt in my mind about Mr. Gray that Saturday afternoon nor any doubt on Monday, October 15, and no [93] doubts at all on Tuesday, October 16, before I saw Mr. Gould and only a slight doubt afterwards.

Thereupon

EMMETT ARJO

was called as a witness on behalf of plaintiff, and he testified as follows:

Direct Examination

I reside in Palo Alto. My business is that of proprietor of a grocery store. I have been proprietor for six years. I know Harry Gray and Gene Harbinson. I have known Harry Gray since 1932. He used to call on me for Swift and Company serving me off the sausage truck. I first met Gene Harbinson in the month of October, 1934. I was introduced to him by Mr. Gray. He was supposed to relieve Mr. Gray while he went on his vacation. After the first introduction, I again met Mr.

(Testimony of Emmett Arjo.)

Harbinson the following Monday about six o'clock in the evening in my store. At the time he called there were a couple of customers there, but there was no conversation until after the customers left.

"Q. What was the conversation?

"Mr. Harrison: Object to that if the Court please, on the ground that it is hearsay, incompetent, irrelevant and immaterial.

"The Court: Overruled. Exception.

"Mr. Harrison: Exception."

(Witness) Mr. Harbinson asked to see my sales tags. I asked the reason for it, and he said Mr. Gray had been accused of taking money from Swift and he was checking up to see how much I paid him. I replied, "I'm sorry; I had no cash dealings with Mr. Gray," that I had a weekly account. [94]

Cross Examination

I had known Mr. Gray for sometime before this incident. I had seen him frequently. He called three times a week. I became acquainted with him socially. We were on pleasant terms. I first heard about this suit against Swift and Company quite a few months afterwards when Mr. Gray stopped and said he was coming out to San Francisco. He asked me about the conversation with Mr. Harbinson when I talked with his lawyer a few months back.

My relations with Mr. Gray continued to be friendly at all times. I have always been friendly with him. I feel friendly toward him now. I believe he is an honest man.

(Testimony of Emmett Arjo.)

All that was ever said by Harbinson was that Mr. Gray was short in his accounts and that he had been accused of taking the money. I feel very friendly to Mr. Gray.

The conversation with Mr. Harbinson took only about three or four minutes.

Thereupon the plaintiff called as a witness on his behalf

FRED LANGBEHN,

who testified as follows:

Direct Examination

I reside in Redwood City, and I am manager of a Purity Store in Palo Alto. In 1934 I was a partner in the Best Buy Market in San Carlos. I know Harry Gray and Mr. Gould. I had a conversation with Mr. Gould subsequent to the time Mr. Gray went on his vacation concerning Mr. Gray.

"Mr. Harbinson: Just a moment. Are you asking for the conversation now, Mr. Welsh? [95]

"Mr. Welsh: Yes.

"Mr. Harrison: We object to that if the Court please on the ground that it is irrelevant, incompetent and immaterial and hearsay.

"The Court: Overruled. Exception.

"Mr. Welsh: Q. Proceed, Mr. Langbehn.

"Mr. Harrison: No evidence of authority proved. Exception."

(Testimony of Fred Langbehn.)

(Witness) Mr. Gould came in to check over bills of things we had bought from Swift and Company off their cold meat wagon. He asked if he could see the bills. I said he could but that we didn't have the bills in the store, that we had them at the house of Mr. Allen, my partners, a few blocks away. He said that he had a car and would take me out to Mr. Allen's house. I went up with him. On the way over there I had a conversation with him.

"Q. Just state what was said?

"Mr. Harrison: Same objection, if the Court please, (that it is irrelevant, incompetent, immaterial, hearsay, and no authority proved).

"The Court: Overruled. Exception.

"Mr. Harrison: Exception."

(Witness) He said the reason he would like to see the bills was it seemed Harry Gray had taken some of Swift's money just before he went on his vacation and they wanted to see just how much he had taken. Nothing more was said. When we arrived at the house, Mrs. Allen got out the bills, and Gould checked the bills we had there with the list he had in his little book. He checked the amounts and the bills with the totals in the book.

"Q. Did he make any other statements while he was going through the slips with reference to Mr. Gray? [96]

"A. Yes, he said——

"Mr. Harrison: Same objection, (that it is irrelevant, incompetent, immaterial, hearsay, and no authority proved).

(Testimony of Fred Langbehn.)

"The Court: Overruled. Exception.

"Mr. Harrison: Exception.

"A. He said it sure looked kind of bad for Harry because it was here the day before he was supposed to go on his vacation and his cash was missing."

Cross Examination

I have talked with Harry Gray recently, and I feel friendly to him. He is a very nice fellow. We always thought he was. I always thought he was honest. I believe now he is honest. I always did believe it. When we were going over there in the car I don't remember whether I asked Gould why he wanted to see the bills or whether he just told me. I might have asked him first. Mr. Gould did not express any ill will personally on his part toward Mr. Gray. I had not known Mr. Gould before that time, and I did not know what his connection with the company was. It was the first time I had seen him. I don't remember word for word what was said. I have discussed this matter with Mr. Gray twice since this suit was begun. At lunchtime today Mr. Harbinson, Mr. Arjo, Mr. Gray, Mrs. Guptill and I all had lunch together.

I have never seen Gould since that time. He introduced himself as Joe Gould.

Thereupon plaintiff called

MRS. POLLY GUPTILL

as a witness on his behalf, and the witness testified as follows:

Direct Examination

I reside in Palo Alto. Prior to December of last [97] year my husband and I operated a restaurant in Burlingame. I know Harry Gray and Phil Gould. Mr. Gould used to come to my place and eat there. I recall in 1934 when Mr. Gray went on his vacation from Swift and Company. Subsequent to that time I had a conversation with Mr. Gould. He came into our place. There was present Mr. Guptill and Dorothy Hamilton, who worked for me. It was right after Mr. Gray was on his vacation, but I don't know the date.

"Q. Just go on from there. What did he say?

"Mr. Harrison: In order that the record may be clear, we object, if the Court please, on the ground that it is immaterial, irrelevant, and incompetent, and no authority proved; hearsay.

"The Court: Overruled. Exception.

"Mr. Harrison: Exception."

(Witness) Mr. Gould asked to look over the receipts. I asked him why. He answered that the reason was that he was sent out by Swift because Harry was short in his accounts, and he wanted to check up on his cash sales slips. I let him see them. I wouldn't say how many days' or what slips he was looking for. He looked at plenty; for several months.

Thereupon the plaintiff called

MRS. DOROTHY HAMILTON KIPPS

as a witness on his behalf, and the witness testified as follows:

Direct Examination

In 1934 I was employed by Guptills in Burlingame. I knew Harry Gray and Phil Gould. Mr. Gould used to take some of his meals in the restaurant. I was present during the con- [98] versation between Mr. Gould and Mr. and Mrs. Guptill in October, 1934.

"Q. Just state what was said.

"Mr. Harrison: Same objection as already stated in the case of the last witness (that it is immaterial, irrelevant and incompetent, and no authority proved; hearsay).

"The Court: Overruled. Exception.

"Mr. Harrison: Exception."

(Witness) Mr. Gould came in and asked to look over the accounts saying that there was a shortage and he wanted to see what Mr. Gray's accounts were with Swift. He stated that it was Harry Gray's accounts that were short.

Cross Examination

I feel friendly to Harry Gray. I respect him and like him. I believe he is honest and always have. I have had no grounds to doubt it.

Thereupon plaintiff called as a witness on his behalf

ARNOLD MONTEMAGNI,

and the witness testified as follows:

Direct Examination

I am a meat cutter. In October, 1934 I worked on B Street in San Mateo in my own market called "Monte's Meat Market". I met Harry Gray at that time when he was delivering for Swift. I knew Gene Harbinson who took over Gray's route.

"Q. Did you have any conversation with Mr. Harbinson in October of 1934 concerning Mr. Gray?

"Mr. Harrison: That is objected to on the ground that is already stated with respect to the last witness (that it is immaterial, irrelevant and incompetent, and no authority proved; hearsay). [99]

"The Court: Overruled. Exception noted.

"Mr. Harrison: Exception."

(Witness) About the time Mr. Gray went on his vacation, Mr. Harbinson took the route and came along and asked me if I could produce some sales tags for the previous week. He told me Mr. Gray was short in his accounts, that is, in collections, and he would like to check on it. I went home and got the sales tags for him and showed them to him when I got back.

Cross Examination

Mr. Harbinson did not say anything to me to the effect that Mr. Gray had been crooked or guilty of

(Testimony of Arnold Montemagni.)

embezzlement or anything to that effect. All he said was that he was checking up because Gray was short in his accounts. And he said that in answer to my question as to why he wanted those tags. As I recall he did not volunteer that remark until I naturally asked him why he wanted them.

The signature on this paper now shown me is my signature.

Thereupon the defendant offered said paper in evidence and it was received and marked as

"DEFENDANT'S EXHIBIT B."

It reads as follows:

> "San Mateo, December 1st, 1936. My name is Arnold Montemagni, residence 407 North C San Mateo. I knew Harry Gray, an employee of Swift & Company. Gray came to me and told me the company had accused him of taking some money. He said something about some money which was lost or taken just before he went on his vacation, and he was accused of taking it. He lost his job some time after his vacation, and about a year after this he said some other person had been convicted and he was going to sue the company. No other person from Swift & Company ever accused Gray of taking this money or any money. Some man from Swift & Company came to see me [100] later and said he wanted to see my receipts about the Gray matter, but this man never ac-

(Testimony of Arnold Montemagni.)

cused Gray of taking the money. This man from Swift saw me about two months after Gray first told me about it.

(Sig.) A. MONTEMAGNI."

Redirect Examination

I have no explanation that I want to make about that statement. No person other than Harry Gray from Swift & Company ever made any remark to me accusing Harry of taking the money. I recall my previous testimony. It was Mr. Harbinson who talked to me. He said he wanted to see my receipt, that Gray was short in his account; that is what I testified to yesterday, and that did occur. I say in this statement over my signature that no person from Swift and Company other than Gray ever accused Gray of taking money or any money. Both of those statements are true.

The written statement contains what I think is the truth and what I think really happened. I tried to explain it to the gentleman who came there just as closely as I could remember. I don't recall who got the statement from me. It was obtained from me at my mother-in-law's place.

Recross Examination

This written statement is correct the best way I can possibly recite it. No person from Swift and Company ever accused Gray of taking the money or any money; nobody has ever told me that. All

(Testimony of Arnold Montemagni.)
they ever asked was for the sale tags for the simple reason that Mr. Gray was short, and that was in answer to my inquiry as to why they wanted the sales tags. [101]

Thereupon the plaintiff

HARRY J. GRAY

was recalled as a witness on his own behalf and testified as follows:

Direct Examination Resumed

The system under which sales tags were issued to me and accounted for was as follows: I received these books from the man that was in charge of the supply room. Each time that he gave me the books they took the numbers down and each book was accounted for on their records. As I made sales down the Peninsula those tickets would naturally come back in either through the charge department or in the cash sales department. If a ticket was made out and something happened that the customer didn't want the goods or I happened to make a mistake and decided to put it on another ticket, I had to write "void" on that ticket, and be sure it came back in because of the fact that each one of those tickets was numbered on what they called a checkerboard system, and as it came back, when it did, whether it was a charge or it was a credit account, it had to be checked off in order to know that each ticket was coming back into the office.

In short, the sales tags were checked out to me and in effect charged to me, and then credited to me when they came back.

My receipt book was a pad containing sheets in triplicate; the original and duplicate were kept by the company and the tissue was returned to me as my receipt. They contained lines for the name of the town, for the customer, for the number of each sales ticket and for the cash collected.

When I put the receipt book, the cash sales tags [102] and the currency and checks into the cashier's window Saturday morning, October 13, 1934, I did not receive the receipt book again; neither it nor anything else was ever found.

The goods which I had on the truck were accounted for in the following manner: Every day they made a list of the goods I ordered and they kept a strict account of what was on the truck; at the end of each week they made out a report showing how much I had sold, how much was left on the truck, how much money I had, and they could account for practically every pound of goods.

After my return from my vacation and my conversation with Mr. Hartl and Mr. White, I talked to practically all of the customers I had formerly served from South San Francisco to Palo Alto.

"Q. Did you have any conversations with those customers as to what had been said about you while you were gone?

"Mr. Harrison: Object to that, if the Court please, on the ground that it is purely hearsay, ir-

(Testimony of Harry J. Gray.)

relevant, incompetent, and immaterial, not binding on this defendant. A statement to the witness cannot be a publication; all that this testimony would tend to prove would be a disclosure to this witness, except in so far as it would be purely hearsay.

"The Court: Overruled, exception.

"Mr. Harrison: Exception."

(Witness) I asked them to show me the tags, again. They were reluctant to do so because they had shown them to Mr. Gould and Mr. Harbinson and thought they had it all straightened out. They were rather cold and indifferent and failed to give me any cooperation as far as finding out what I wanted to know. Some refused to show me the tags and some [103] finally did. They wanted to know what Swift and Company had charged me with and how much money I had gone south with, what I had done with the new car I bought with the money and remarks of that type.

I came back and asked Mr. Hartl if I could go through the records again. No one else was present.

"Q. Give us the conversation with Mr. Hartl?

"A. I asked——

"Mr. Harrison: That is objected to on the ground that a statement to the witness can't be slander, if the Court please.

"The Court: Overruled. Exception.

"Mr. Harrison: Exception."

(Witness resuming) I asked if I could check through the tickets again, and he refused me, saying that the case was closed; that they wanted that

(Testimony of Harry J. Gray.)

check that I had given them once, and he says, "As soon as you give us the check we will close this and forget all about it." So I went to Mr. Kelly and asked if he wouldn't do something about it to help me, because no one was giving me any cooperation getting to the bottom of it. So he finally talked to Mr. Hartl, and Mr. Hartl consented that I could look through the tags again.

I started to look through the tags, but after about five minutes interval, Mr. Hartl grabbed the tickets out of my hand and never let me have them again.

I had another conversation when I came back to Swift and Company and left them another check to make up the money that they said they would charge me with if I didn't make it up. I expected them to let me go back. I made the check out and said, "I go back on the job, don't I?", and Mr. White and [104] Mr. Hartl had a conversation, which I didn't hear, and they came back and Mr. White said "No, we can't put you back on the truck". I asked if there were any sales jobs on the sales force they could give me. They said they had nothing for me.

"Q. Mr. Gray, did you take any of this money that you collected on that Friday morning and keep it?

"Mr. Harrison: That is objected to on this ground: There is no claim in this case that this witness embezzled or took the money; there is no attempt to defend on that ground. The claim is simply

(Testimony of Harry J. Gray.)

that the statement that he was short in his accounts was true. And we submit that it is wholly immaterial, whether or not he took the money.

"The Court: Overruled.

"Mr. Harrison: Exception.

(Witness resuming) No, sir, I never collected any money for Swift & Company and failed to turn it in.

After that, I tried to find employment with some of the meat companies that operated down the Peninsula where I had gotten my experience, where I knew most of the managers of the different stores and markets.

"Q. Who was the first meat company you applied to for employment?

"Mr. Harrison: That is objected to, if the Court please, on the ground that it is irrelevant, incompetent and immaterial and has no connection with the slander charged. Now, there is no showing here and no showing has been attempted to be made that any disparaging remarks of any kind or character were made to any other employers. Counsel now is going into the question of what other employers may have done, and that will obviously open a very wide scope of inquiry. [105]

"The Court: Overruled.

"Mr. Harrison: Exception."

(Witness resuming) I first applied for employment at the Virden Packing Company at its offices

(Testimony of Harry J. Gray.)

in South San Francisco, and I talked with the Sales Manager, whose name I don't recall.

"Q. What was the conversation you had with the sales manager of the Virden Packing Company?

"Mr. Harrison: That is objected to as hearsay, incompetent, irrelevant and immaterial.

"The Court: Overruled.

"Mr. Harrison: Exception."

(Witness resuming) He told me to drop back in a day or two and he then told me that he had nothing for me.

I next applied to Cudahy Packing Company in San Francisco and talked either to the Sales Manager or the General Manager; I don't recall the name.

"Q. Give us the conversation you had with that man at Cudahy's.

"Mr. Harrison: Same objection, if the Court please, irrelevant, incompetent, immaterial and hearsay.

"The Court: Overruled.

"Mr. Harrison: Exception."

(Witness resuming) I told him the experience that I had; that I wanted to stay in the meat business; that I was willing and had an education and quite a foundation in the meat business; that I thought I could do them some good. He was very much interested in it. I dropped back in several days and spoke to him again and he said that he didn't have anything for me.

(Testimony of Harry J. Gray.)

I next applied in San Francisco to Hormel Packing Company, to the Sales Manager; I do not know his name. [106]

"Mr. Van Dyke: Give the conversation you had with the Sales Manager of Hormel Packing Company.

"Mr. Harrison: We object upon the same ground.

"The Court: Yes. Overruled.

"Mr. Harrison: Exception."

(Witness resuming) I told him about the same as I had told the other concerns, and he asked me to take this application and fill it out and he would talk to me, or I could just talk to the General Manager when I came back. I filled out the application and came back and talked to either the Sales Manager or the General Manager, either one of the two. On the first occasion I don't remember whether it was the Sales Manager; it was one or the other; I talked to both men. I asked the second man if I should leave my application blank that I had filled out and he said, "No, I'm afraid we haven't any place for you.

I then went to Hickman Products Company, the distributors for Best Foods products.

"Q. What happened there? Give the conversation you had with those people at Hickman Products Company.

"Mr. Harrison: My objection goes to this conversation, too, if the Court please.

"The Court: Yes. Overruled.

"Mr. Harrison: Exception."

(Testimony of Harry J. Gray.)

(Witness resuming) I told him my experience down the Peninsula, that I had been running a truck similar to the one that they had down there. I came back later and he said that they had nothing for me.

I then answered an advertisement for a salesman with the Zee and Zoe, a Zellerbach subsidiary. They answered my letter and I went out to see them. [107]

"Q. Give the conversation at Zee and Zoe.

"Mr. Harrison: We object to the conversation on the grounds already stated.

"The Court: Overruled.

"Mr. Harrison: Exception."

(Witness resuming) He told me he was considering three men, of whom I was one. He also asked me to come back the following day, and he would give me his answer. I came back the following day, but he said, "I am sorry, Mr. Gray; we have given the job to some one else.

I then worked a week or ten days with the Hoover Vacuum Company on a strictly commission basis. As I did not make expenses, I did not stay with the job. I then went to Los Angeles and obtained employment after four or five months.

After I decided that they had found the man that I had accused all along, I went to Swift & Company in Los Angeles and asked employment there. I spoke to the General Manager of the Los Angeles plant. He was interested to know that I had spent

(Testimony of Harry J. Gray.)

time in the plant and with the sales force with Swift & Company up here. He said, "We are looking for a man of your type and ability, and would you come back and see me in about a week or ten days?" When I came back he said, "Gray, we have investigated your record and I am sorry but we don't have anything for you."

I also applied at the Cudahy Packing Company in Los Angeles and the Houser Packing Company in Los Angeles.

"Q. Did you get employment at either Cudahy or Houser in Los Angeles?

"Mr. Harrison: Object to that on the ground that it is immaterial, remote and having no connection with the slander complained of. [108]

"The Court: Overruled.

"Mr. Harrison: Exception."

(Witness resuming) No, sir. I did not get employment after I left San Francisco until June 1935. I obtained employment with the Carnation Milk Company, as a milkman, and worked until April 1937. I came back to San Francisco and talked with the officials of Swift & Company on two different occasions. The first time was after I learned in the paper about Jack Hamilton's trouble; that was in April 1935. I talked with Mr. Hartl at Swift & Company's plant, but with no one else.

"Q. What was your conversation with Mr. Hartl about the matter?

(Testimony of Harry J. Gray.)

"Mr. Harrison: Object to that on the ground that it is irrelevant and immaterial.

"The Court: Overruled.

"Mr. Harrison: Exception."

(Witness resuming) I told Mr. Hartl that I had just come from interviewing Jack Hamilton down at his home near Santa Clara. And he asked me what Mr. Hamilton had said. I told him that I had accused Jack Hamilton point blank of being the man that framed me all along; that I wanted him to admit his guilt against me and straighten me out after he had caused all the trouble for me. Mr. Hartl said, "Gray, what did he say?" I said, "He just wouldn't admit it. He said he was on leave of absence and there was no trouble with Swift & Company." So Mr. Hartl said that he never believed that Hamilton was guilty of all that they had charged him with, because he was one of his very best friends. I asked him to reimburse me with this money I so willingly paid when all this trouble arose. He said, "Until Hamilton admits he stole it from you, we can't do a thing about it." [109]

I went to Los Angeles, and came up again after they had finally charged Jack Hamilton with embezzlement. I first went to the Swift plant and saw Mr. Hartl.

"Q. Give the conversation.

"Mr. Harrison: My objection goes to this as irrelevant, incompetent and immaterial.

"The Court: Yes. Overruled.

(Testimony of Harry J. Gray.)

"Mr. Harrison: Exception."

(Witness resuming) I asked him again if he would reimburse me and he said "Gray, it is entirely out of my hands. I would advise you to go to see Mr. Smart, our attorney."

"Q. Did you go to see Mr. Smart?

"A. I went to Mr. Smart, Swift & Company's attorney, and told him, explained the case to him.

"Mr. Harrison: This is objected to, if the Court please, as immaterial.

"The Court: Overruled.

"Mr. Harrison: Exception."

(Witness resuming) And Mr. Smart said that there was nothing that he could do but advise me to go and see Jack Hamilton's attorney, which I did. I went to Jack Hamilton's attorney and demanded that he——

"Mr. Harrison: I object to this as dealing with a matter that obviously has no bearing on the controversy between this plaintiff and the defendant, if the Court please.

"The Court: Overruled.

"Mr. Harrison: Exception.

"Mr. Van Dyke: Go ahead."

(Witness resuming) I demanded of Jack Hamilton's attorney that he make up the money he had stolen from me, which he said he [110] didn't know anything about. I in turn went to Redwood City where Hamilton was in jail. I had a talk with Hamilton and then returned and talked to the Dis-

(Testimony of Harry J. Gray.)

trict Attorney. I did not go back to Swift & Company. That was the last time I saw them.

At the time I lost my job at Swift & Company, I was getting $37.50 a week.

Cross Examination

I now reside in San Jose and have lived there since October, 1937. I am a salesman with Johnson Wax Company. I went to work for them in September 1937 and receive $140.00 per month.

I first went to work for Swift & Company in January 1933. I first went on this truck route in October, 1933. In the meanwhile I was working in the plant. There were approximately 100 or 125 customers on the route; one-third cash customers and two-thirds charge; approximately thirty-five cash customers. They extended from South San Francisco to Palo Alto and Mayfield.

In December 1934, I worked for the Hoover Company for [111] ten days or two weeks. I voluntarily left the Hoover Company. I went to Los Angeles January 2, 1935. My employment with Swift and Company terminated on October 29, 1934. I cannot recall the names of any person to whom I applied for employment in November. When I went to Los Angeles I began to seek employment immediately. I was employed by the Carnation Company there in June, 1935, and I earned on an average of $124 to $143 a month with them. I worked for them until March, 1937. I was not employed from March to September, 1937.

(Testimony of Harry J. Gray.)

Going back to Saturday afternoon, October 13, 1934, after searching in the office I made a search in my room to see if any of the receipts had been left there. When I went to the room I saw Mr. Gould. I had no conversation with him in the room. He was in the room with me while I made the search. At one time he had been a room mate of mine. At that time Mr. Harbinson was my room mate. My relations with Mr. Harbinson and Mr. Gould were friendly at that time. I had gone on social affairs with Mr. Gould a few times.

At the time I say I threw the money into the cage on Saturday morning, nobody was with me.

The list you now show me is the list of customers which I wrote out that Saturday afternoon.

Thereupon the defendant offered the list in evidence and it was received and marked

"DEFENDANT'S EXHIBIT C."

It reads as follows:

"1. L. A. Fruit Market, Burlingame, Broadway.
2. Peninsula Fruit, San Mateo, 5.69 check.
3. Palm Market, San Mateo 4.
4. Larry's Grocery San Mateo.
5. Belmont Cash Market 3.31.
6. Best Buy Market San Carlos.
7. Sequoia Market, Redwood, 2.91.
8. Roosevelt Market, Redwood, 2.73.
9. Halletts, Redwood, 3.43. [112]
10. Dumbrach, Redwood, 2.97.

(Testimony of Harry J. Gray.)

11. Economy Market, Menlo Park.
12. Pantry Shelf, Palo Alto.
13. Arjo Tavern, Beer Tavern.
14. Aubrey's Dele., 4.62."

(Witness resuming) Defendant's Exhibit C is in my handwriting. It was written by me that Saturday afternoon. I drew up that list with the intention that someone should check the route.

When I came back to see Mr. White after that first interview, I asked him whether I could have the route. He did not directly offer me a job, but about ten days or a week afterward I heard either through Mr. Gould or Mr. Harbinson that I could probably find a job in the plant. I did not then go back and ask for a position.

That Saturday afternoon, October 13, after ransacking the baskets and finding no trace of any tickets or anything, Mr. Everett said, "Mr. Gray, what do you propose to do about this?" I said, "Irving, it looks like a case where the money is gone. There is nothing that I can possibly do. I will give you a list of all people that I collected from yesterday. I can give you the approximate amount of the money that I collected from each one. Mr. Harbinson was with me, and he will remember, and that will be a double check. I will give you this list, and let you check it, and find out how much it is. I have a check coming for a week's salary and the week you have given me

(Testimony of Harry J. Gray.)

for a vacation. That is enough to cover this amount," which I thought was around $60.00. "I realize the money is gone; that I haven't a receipt to show you for it; but naturally I have to make it good, and as long as I have that much money here you don't have to worry about me, and I am not running away; in fact, I am coming back, and I would like to get to the bottom of it." [113]

I just volunteered to give the list to Everett.

I knew that it was the rule of Swift and Company that any money collected during a given day should be turned in that night. I worked on the route for approximately a year. During the last seven months I put the money in the cage the morning following collection, and I did not turn the money in at night. During the first months I left the money at night with the night order clerk about one-third of the time, but took it home about a third of the time. The night order clerk was Lloyd Deering.

With respect to the system that they were using down there, I had a collection book; also invoices or sales tags. When I turned in a day's collections I turned in with it to the company two of the three copies of sales tags, if it was a paid account, one being left with the customer. I never filled out the names of the purchasers on the stubs.

The collection reports are also in triplicate, one copy a white, one a yellow and one a tissue. For each town two copies were turned in to the com-

(Testimony of Harry J. Gray.)

pany and one was either retained by me or came back to me for my own records. The system was that the salesman at the end of the day was supposed to turn in to the credit department the invoices for the credit sales and was supposed to turn in with his cash and checks the two invoices for the cash sales and also his collection report.

I usually got back from work about 7:30 in the evening. Sometimes Mr. Deering, the night order clerk, was there and sometimes not. Most of the time he was there at 7:30. I decided after the first few months that I would not turn the money over to the night order clerk because I could not get a receipt, but I would turn it in the morning, keeping it over [114] night. When I turned it in the mornings, I did not get a receipt then because no one was there to give me a receipt before I started on the route.

After I went down the peninsula on October 29, 1934, or within a few days thereafter, and had the conversations with the people on the route, I did not tell Mr. Hartl or any other officer of the company that I had been slandered.

Mr. Hartl never said to me that I had stolen any money; what he said was that I was suspended from the company; that he had wired to Chicago and that I was suspended, and that I was short, and my accounts came to some $150, and it was up to me to make it up. He did not say I had stolen

(Testimony of Harry J. Gray.)

any money; he said my accounts did not balance, that I was short.

On October 29, 1934, I drew my checks in favor of Swift and Company in the sum of $58.73 and then had payment on it stopped, after I had delivered it to Mr. Hartl.

The letter you show me from Swift and Company, per J. A. White, dated March 4, 1935, was received by me shortly after its date.

Thereupon the said letter was offered in evidence by the defendant and received and marked

DEFENDANT'S EXHIBIT "G".

It reads as follows:

"March 4, 1935. Mr. Harry J. Gray, 480 North Orlando, Los Angeles, Cal. Dear Sir:

"While I was very glad to receive your letter, I am somewhat surprised that you are reopening the incident that occurred some time ago, as we were under the impression that we had satisfied you of the fact that you were innocent of any attempt to defraud the company but were only careless in the handling of your accounts. As far as we are concerned, the matter is closed.

"Should you happen to be at San Francisco at any time, we will always be glad to have you come in and see us.

"Very truly yours,
SWIFT & COMPANY,
Per J. A. WHITE." [115]

(Testimony of Harry J. Gray.)

(Witness resuming) This other letter you show me is in my handwriting. It was written shortly before March 4, 1935. Mr. White's letter, Defendant's Exhibit G, was in answer to it.

Thereupon said letter was offered in evidence by the defendant and received and marked

DEFENDANT'S EXHIBIT "H".

It reads as follows:

"Harry J. Gray,
480 N. Orlando,
Los Angeles, Calif.

"Mr. James White
Swift and Co.
South San Francisco.

Dear Mr. White:

Well, here I am back again! As I said once before—'I won't give up until the mystery is solved.'

A rumor drifted down from South City the other day, which held considerable interest for me. I understand that Jack Hamilton and his books are under a rigid investigation. I feel that if this is true, I can play a big part in helping Swift & Co. prove that there is 'something wrong going on inside that cashier's cage.'

Here's what I'm willing to do, Mr. White—I'll go to the expense of making a trip up there

(Testimony of Harry J. Gray.)

to help Swift and Co., and I only ask two things of you—'that right down in your heart you believe me innocent of the trouble in October (which I am); and that you are now willing to listen to my story concerning Jack Hamilton.' If you will consent to do this I will convince you or any jury, within fifteen minutes time, that Jack Hamilton—and no one else—is the person who caused all my trouble in October and probably the one who is causing all your trouble at the present time.

I shall be awaiting a reply in the near future.

Sincerely,

HARRY J. GRAY."

(Witness resuming) In this matter of the receipts: after I decided to keep the money over nights and turn it in in the mornings, when I turned it in in the morning I did not [116] get any receipt. When the money would reach the proper source, I would get back the tissue in this collection report, sometimes a day or sometimes two days later. I used as many as three or four different receipt books. When I got them back my receipt was in the form of a stamp marked "Paid" or "Received" on the tissue. The only receipt I got was my collection book in the form of a tissue.

In the early months when I used to observe the company rule and turn in my money to the night order clerk, I would give him my collection book

(Testimony of Harry J. Gray.)

and I would receive my tissue with the mark "Paid" later. I would get it two or three days later in exactly the same form as I got it when subsequently I kept the money over night in my room. During the period of three or four months when I left the money with Mr. Deering a third of the time, every night when I went in, I asked him for a receipt and every night he refused.

I testified on direct examination about going down on the Peninsula to see some of these customers after I had examined the company records, and I spoke about certain remarks they made to me. I called on 45 or 50 of them. As to those who made these remarks to me, I can recall the names of Mrs. Guptill and Mrs. Kipps, and Kenny Angus at the Peninsula Market; he is no longer there. Angus said to me, "Well, did you go south with your dough, or didn't you?" A butcher named Bud Joos used to call me "Jesse James," and there was a fellow named Jack in the Sequoia Market in San Mateo.

I am now doing business in the same territory with some of the same people.

As to who else besides Angus and Joos and the people at Guptill's coffee house made these opprobrious remarks, well [117] this chap Larry that owned this grocery store, he was one of several that made them. That is Larry's Groceteria. The remarks he said was: "Did you have a good time on

(Testimony of Harry J. Gray.)

that money that you went south with?" I can't recall the name of anyone else who made remarks. There was the manager in the Nelson Meat Company, but I don't know his name. I don't recall what he said. The people in Guptill's cafe were good friends of mine.

"Mr. Van Dyke: We have never said that they spoke in an opprobrious manner or took them seriously or anything of the sort. That is Mr. Harrison's designation."

(Witness resuming) Mrs. Guptill did not apply terms such as "Jesse James" or "John Dillinger" or anything of that sort.

Redirect Examination

The check now shown me was signed by me and given to Swift and Company to take the place of the check upon which payment was stopped.

It was a company rule to turn in my money and get a receipt for it. The instructions were to turn the money in to the cashier. I think I spoke to Mr. Kelly and asked him why I couldn't get a receipt. He said, "Why won't Lloyd Deering give you a receipt?" I replied, "I don't know; he just won't give me a receipt regardless of what I do or say. He has the money. He says he would be responsible for it if he gave me a receipt, so he isn't going to be responsible for it."

During the period of six or seven months when I had ceased turning the money over to the order

(Testimony of Harry J. Gray.)

clerk and was turning it in the next morning, nothing was said about it being a violation of the rule. [118]

This collection report is what I have referred to as my receipt book. The collection book sheets were not charged out to me by number or anything of that sort, but the invoice books were. Each time an invoice book was given me I was charged with the total number of tags that were in it. They had a checkerboard system to see if I returned to them all the sales tags. I had to account for each ticket.

Recross Examination

I say I did not turn the money into the night order clerk in the later months because I could not get a receipt. The reason I turned it in the following morning although there was nobody there to give me a receipt then was that it had to be turned in some time. When I turned it in in the mornings, there was no man to receipt for it. The cashier usually got it later. Mr. Everett was usually in the office at that time in the morning. I did not hand the money to him but would comment to them that I had left it inside the cashier's office. There was always somebody around, except that single Saturday morning. I knew that Mr. Everett had nothing to do with the money, that it was not in his department, that he had duties of his own in the sales department.

Thereupon the plaintiff rested.

Thereupon counsel for the defendant made a motion for nonsuit and dismissal as follows: "The defendant in this case moves for a judgment of nonsuit, or dismissal, on the following grounds: First, that it appears affirmatively from the evidence that the utterances complained of are privileged in character, and that under the provisions of Section 47 of the Civil Code [119] of California and under the Common Law, no cause of action arises therefrom; inasmuch as it appears by uncontradicted testimony that the only communications here made were communications without malice to a person interested therein by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent; or, three, who is requested by the person interested to give the information."

Thereupon the said motion was denied by the Court, to which ruling counsel for defendant then and there excepted.

Thereupon defendant called as a witness on its behalf

LAWRENCE LEWIN,

who testified as follows:

Direct Examination

I reside in San Francisco, and I am employed by the City and County of San Francisco in the con-

(Testimony of Lawrence Lewin.)

troller's office. In the year 1934 I was in business in San Mateo in a grocery store known as "Larry's Groceteria." My first name is Lawrence, and I am called Larry. The shop was my own. I was one of the customers of Swift and Company. In the year 1934 I had a call from somebody from Swift and Company with respect to checking up on some of my records. I did not recall the name of the man until today when I met him in the hall and recognized him instantly. It was Mr. Gould.

Mr. Gould called on me that particular day and asked me if I had any information relative to a certain item I had purchased from them. I looked up my files on the matter and [120] pulled it out and showed it to him. He asked if it was all right if he could keep that bill and I said it was. He did not on that occasion say anything about any employee or former employee of Swift and Company. I never heard from Mr. Gould or any employee of Swift and Company any statement disparaging another employee or former employee.

Seeing Mr. Gray in the court room, I think I recall him now.

I never said anything to Mr. Gray to the effect that he had gone south with some money or anything to that effect. I never said anything to him disparaging his character or honesty.

(Testimony of Lawrence Lewin.)

Cross Examination

I met Mr. Gray calling at my store. He called there regularly for a period of just a few months. He called on me regularly twice a week. I do not remember who took his place because Swift and Company soon stopped calling on me entirely and I was dealing with another house. They ceased calling on me after Mr. Gray was driving. I do not recall by name the man who was driving at the time they ceased calling on me.

I never heard anything about the charge that Mr. Gray had been short in his accounts with Swift and Company. I never heard a thing about it.

When Mr. Gould came to me, he asked to see if I had some records on an item I had purchased from Swift. It was a cash transaction. I did not ask him why he wanted the information. He led me to believe that he was more or less checking up on something, that is, just checking accounts, and he asked me if I would give it to him, and I was more than willing to [121] cooperate with him. The accounts which he was checking, he said, were the company's own books. He did not tell me why he was checking it up.

I do not recall whether I asked him why. He did not mention the name of Gray at all.

Redirect Examination

The driver who succeeded Gray on that route did not make any remarks to me about Gray or his character or conduct.

Thereupon the defendant called as a witness on its own behalf

MAURICE HOGAN,

who testified as follows:

Direct Examination

I reside in Los Angeles. I am an investigator and I am also admitted to practice law. In 1936 I did some investigating work for Swift and Company.

Defendant's Exhibit A for identification, aside from the signature of Mr. Gould, is in my handwriting. It was made by me in December, 1936, at Sacramento, in the presence of Mr. Gould and Mr. Harbinson in a restaurant near the Senator Hotel around twelve o'clock noon. Before writing it, I had a conversation with Mr. Harbinson. I told him that I wanted to talk to him about a suit that had been instituted against Swift and Company by Mr. Gray and asked him if he knew anything about the circumstances about the suit, and he said he did. I asked him what he knew about it, as to whether or not he heard any people make any remarks about Mr. Gray being short in any accounts. I made a memorandum of the statements he made to me on that occasion. Defendant's Exhibit A [122] for identification is that memorandum. I made that memorandum while he was telling me about it. He gave me his name and where he lived and so forth, and I would ask him the questions, and he would answer the statements, and I would reduce it to writing. After I finished writing it, I read this

(Testimony of Maurice Hogan.)

memorandum, Defendant's Exhibit A for identification, aloud and asked if that was correct, and he said it was. He said, "I wish to read it." I gave it to him, and he read it over. I asked him if he would sign that statement of facts, and he said he would not. He just said that that was the statement of facts as near as he remembered the circumstances, and that was approximately all that was said in that respect.

Thereupon the defendant offered in evidence said document previously marked Defendant's Exhibit A for identification, and it was received and marked

Defendant's Exhibit A

in evidence, and reads as follows:

"Sacramento, Calif.

December 3rd, 1936.

"My name is Eugene Harbenson and I live at 916 Mission Way. I am twenty-seven years of age and at present I operate my father's ranch in Yolo County. I was employed by Swift & Co. from July 1934 until February 1936. During this time I became acquainted with Harry Gray and Charles Gould. I roomed with them about four or five months. About one week before Harry Gray went on his vacation in October, 1934, I was sent out on the route with Gray to learn the route and his customers. On October 13th, 1934, Mr. Gray advised me

(Testimony of Maurice Hogan.)

he was short in his accounts as the cashier Mr. Hamilton told him his money had not been accounted for. Gray made up a memo and gave me regarding his collections and told me to see the customers and find out the amounts paid. My conversation with Gray was on Saturday afternoon and on Monday morning following I went out on Gray's route. I remember the L. A. Market in which I ask for the tickets and the lady ask why I wanted them and I told her that Gray was short and I wanted to find out the amount. I recall Gray giving me a list of places to call on and find out the amounts. I recall calling on several customers and checking their [123] bill and in each case what I told them was that I was checking accounts of Gray as he was on his vacation and was short. I recall that Gray said to me that whatever the outcome was to wait until he came back.

"This statement taken in the presence of Mr. Chas. Gould and M. P. Hogan and the same was true and correct.

"Witness M. P. HOGAN
CHAS. GOULD."

(Witness resuming) On that occasion during that conversation, I was sober. I had had two drinks that day. This restaurant had a bar in connection with it, and when we arrived there about 11 or 11:15, I had a gin fizz. I had another before lunch. I was

(Testimony of Maurice Hogan.)

not conscious of any effect as far as clearness of mind was concerned. Mr. Gould on that occasion was sober. I think he had a glass of beer with his lunch. He was perfectly sober.

Cross Examination

I was there about one and a half hours. Besides talking about this matter, Gould and I had lunch. I cannot recall whether the conversation was before or after lunch.

Before going up there to see Mr. Harbinson with Mr. Gould, I talked to a lot of people about this case. I talked to Mr. Kelly and to Mr. Smart. I did not talk with anybody about taking this statement from Mr. Harbinson. I happened to go up there because it was part of the investigation. Mr. Smart put me on the investigation. He is with Swift and Company, and I talked to him about it. I discussed with him the facts I had gathered during the investigation. Mr. Smart did not suggest to me what he wanted me to inquire about when I saw Harbinson. He told me to make an investigation of the entire case and did not mention Harbinson in par- [124] ticular or tell me what to ask him.

Prior to December 3, 1936, I had been on the investigation about five days working down the Peninsula, talking to members of the concerns on Mr. Gray's route.

I wrote this statement as I went along during the course of the conversation with Mr. Harbinson. The

(Testimony of Maurice Hogan.)

statement appearing on it, "This statement taken in the presence of Mr. Chas. Gould and Mr. Hogan and the same is true and correct," was written by me after he had handed it back to me and said that he would not sign it. I then asked him "That is true and correct?" and he stated, "Yes," and I wrote on it that statement in his presence. He refused to sign it, but he did state it was correct after reading it. He did not say he refused to sign it because it was not correct. What he did say was "I want to be fair to Swift. I want to be fair to Mr. Gray. I do not want to get involved in this litigation because I do not want to testify. I might say something that might hurt one or the other, and the facts are facts, those are the facts as I know them, but I do not care to sign the statement." I did not offer to give him a copy of the statement, and he did not ask me for a copy. If he had asked me for a copy, he could have had one. It is not the general practice in taking statements of people in making investigations to give a copy of what they sign to them unless they ask for it. I signed it immediately after it was read to him. I said, "You acknowldege this as correct?" He said, "Yes, everything in there is the fact as I know it." Then I wrote that down and witnessed it.

Mr. Harbinson did not give me any other names at that time other than the lady in the Los Angeles Market. He did not tell me what places he had called on. I asked him what places [125] he had called on, but he said that he could not recall.

Thereupon the defendant called as a witness on its behalf

IRVING EVERETT,

who testified as follows:

Direct Examination

I reside in Redwood City and am employed by Swift and Company. I was in 1934 assistant to Mr. Kelly, the sales manager at South San Francisco.

The general duties of the sales manager were to supervise and promote sales in the territory from north of Fresno to the Oregon line. The sales manager had nothing to do with discrepancies in accounts or checking of accounts. That fell to the plant auditor, Mr. Hartl.

I recall a Saturday in October, 1934, just before Mr. Gray went on his vacation. Mr. Kelly was in Chicago at that time.

I saw Mr. Gray on the afternoon of that Saturday, October 13. I had come back from lunch about one or shortly thereafter and gone to my desk to clean up various details that were left until the afternoon. I don't know how long I had been there but eventually I heard Mr. Gray and Mr. Harbinson at the back of the office near the desk of the cashier's cage discussing a shortage or the fact that he had placed his envelope in the cage and it was not there. I don't know whether they invited me into the conversation or whether I, for curiosity's sake, got up and went back to the back of the room to see what it was all about, but at any rate I got back

(Testimony of Irving Everett.)

there and Mr. Gray and Mr. Harbinson were still there. Mr. Gray was excited about the fact that Mr. Hamilton had told him that this [126] envelope was not there when he came that morning, and, as I recall it, about that time Mr. Hamilton walked from the back of the office over towards the cashier's cage and there was some discussion between Mr. Gray and Mr. Hamilton. I don't remember the exact words, but it was Mr. Hamilton confirming the fact that the envelope was not there. About that time, or very shortly after, Mr. Gray and Mr. Harbinson left there and went over to the hotel room. They might have been gone as long as an hour, possibly less. In the meantime, I went back to my desk and went to work. Shortly afterwards they came back and Mr. Gould was with them, who had learned about this loss of the envelope, and all three of them came in and engaged themselves in a search for this envelope. I don't remember any of the details of the search other than I do remember Mr. Gould looking in the waste basket for the envelope. At that time I finished my work and went home, and that was the last I knew of it on that day.

I did not notice Mr. Gray writing out a list. I did not see any writing done. Prior to the last few weeks in connection with the preparation for this trial, I had never seen the paper which has been introduced in evidence here as Defendant's Exhibit C.

I never gave Mr. Harbinson any directions about checking this route. I never discussed that subject

(Testimony of Irving Everett.)

with Mr. Harbinson at all. I never discussed this list, Defendant's Exhibit C, with Mr. Harbinson. I am sure about that. I recall no occasions on which Mr. Gray in the mornings would speak to me about the deposit of his money in the cashier's cage. I very seldom saw him mornings. [127]

Cross Examination

I generally get to my office about seven-thirty in the morning. I never saw Mr. Gray put his envelope into the cage. I was never working near the cage, as my back would be turned toward it, four desks away. I do not know that he ever did put his envelope into the cage.

Mr. Gray was under the supervision of the plant sales department, and I was assistant in that department. As assistant manager, I had some authority over Mr. Gray. When the manager was away, I had pretty complete control over him.

I did not know directly or by rumor that he sometimes put his money in the cashier's cage in the morning. I did not even learn of it by hearsay, until after the present suit had arisen, and when it was being investigated about six weeks ago.

Referring to that Saturday afternoon when I heard Gray and Harbinson talking to Hamilton, I did not join in the conversation at all. I had nothing to do with it. I heard Mr. Hamilton tell Gray that he had not turned in his money. I listened to the conversation and heard it mentioned that Gray claimed to have put his money there in the

(Testimony of Irving Everett.)

morning. I did not hear at any other time that he had put his money there in the morning in the cashier's cage. When I heard it that time, I knew that it was not according to the rule. I did not ask Gray anything about why he had violated the rule. I made no comment nor asked any question about it. I did not see anybody make a search in the cage. I saw Mr. Gould look in a wastepaper basket outside of the cage two or three desks away.

I heard that they were looking for a supposedly lost envelope containing money and that it was Gray's envelope they [128] were looking for. I knew it was receipts for the previous day they were looking for and that Mr. Hamilton claimed he never got it, also that Mr. Gray claimed he put it there before Hamilton came that morning. I did not join in the conversation or comment on this being a breach of the rule.

I paid no attention to the matter from that time on, either officially or privately. I had no part in the case whatever. I was not present at any conversation concerning it wherein Mr. Hartl and Mr. Kelly were present. I never heard it discussed with any of those people. I never discussed it with Mr. Kelly. I had no discussions about it. I don't know whether the money was ever found, except what I have heard since this case came up. I don't know whether Gray's successor on that route put the money in the cashier's cage in the mornings.

I did not tell Mr. Harbinson when he left that Saturday afternoon that I wanted to see him on

(Testimony of Irving Everett.)

Monday. I did not talk to him that Monday, and I did not tell him to check the list of sales of the previous Friday. I had positively nothing to do with any investigation as to what had happened or who had been sold that Friday.

On that Saturday afternoon when Gould, Harbinson, Gray and Hamilton were searching around, I did not hear them say what was in the envelope. I knew there would be money in it if it was the previous day's work and that there would be tags to go with the money, but I was not particularly interested as to whether or not there was some record of the sales.

I never discussed with Mr. Hamilton what they were doing that morning. I never discussed afterwards whether or [129] not they had found the money. Mr. Hamilton did not at any time afterwards report to me that Mr. Gray had not turned in his collections.

Mr. Kelly came back sometime after that Saturday. In his absence the responsibility of the department was mine. That is, I did everything when Mr. Kelly was away that Mr. Kelly did when he was there. I knew Mr. Gray was going on vacation on the Monday following. I had no discussion with him about his going on that vacation. His vacation had been scheduled before Mr. Kelly left. The man to relieve him was selected by Mr. Kelly, and that man had been put on the route by Mr. Kelly about

(Testimony of Irving Everett.)

three days before to get his instructions from Mr. Gray for handling the route in his absence.

I was not particularly interested in whether or not the man who had not turned in his collections was going on vacation. He did not ask me about going on his vacation notwithstanding this trouble had arisen.

When he came back from his vacation I had no conversations with him at all about the matter of the missing money. The only conversation I ever had with Mr. Gray was long after that, after he had returned from Los Angeles, when I met him in the yard in front of the plant.

Mr. Gray on returning from his vacation did not go back to work with me. I never made any inquiry why. I knew without asking that he would not go back to work on the route until the discrepancy was cleared up. I knew that according to the rules. I knew there was a discrepancy when Gray left. [130]

Redirect Examination

When Gray's vacation expired, Mr. Kelly had already returned, and after Mr. Kelly's return, Mr. Kelly was in charge of the salesmen. I had no responsibility at all with respect to the retention of salesmen after Mr. Kelly's return.

On Saturday afternoon, October 13, when I heard this conversation I knew that Gray was going on his vacation, and before I had any occasion to

(Testimony of Irving Everett.)

exercise any control over him at all, Mr. Kelly had returned.

There were two reasons why I did not take any particular interest in following up, as a matter of personal responsibility, the matter of this discrepancy they were talking about. In the first place, Mr. Gray was going on his vacation; the sales manager, before he left, had already given him his vacation and selected the relief salesman, and there was nothing for me to do. Had a discrepancy occurred at a time when this man was not going on his vacation, and the sales manager had been away, then it would have been up to me to have replaced the man on the route. That was one reason. The other reason was that there are definite instructions in Swift and Company to their sales department, that when discrepancies or shortages, or anything of that nature, occur on the route, the sales department has positively nothing to do with it, that man automatically comes under the jurisdiction of the plant auditor and the only part we play is replacing the man on the route. The plant auditor tells us that he is going to take the man off the route and we have nothing to do except to replace him with a suitable man. [131]

Recross Examination

The plant auditor did not tell me he was taking Mr. Gray off the route, and I do not know whether he told Mr. Kelly. Mr. Gray was a salesman on

(Testimony of Irving Everett.)

the force and I used to see him come in and talk to Mr. Kelly occasionally. I used to see him in and out of the office, but other than that I did not know him personally at all.

Redirect Examination

In case a discrepancy occurs of this character, the matter of checking up on the discrepancy falls within the jurisdiction of the auditor's department and not that of the sales manager's department.

Thereupon the defendant called as a witness on its behalf

CHARLES PHILLIP GOULD, JR.,

who testified as follows:

Direct Examination

My name is Charles Phillip Gould and not Joe Gould. I reside in the San Joaquin Valley near Ripon. My occupation is taking care of a ranch. I ceased to be employed by Swift and Company about two weeks ago.

I know Harry Gray, the plaintiff. In 1934 we were both employed by Swift and Company at their South San Francisco plant. We both lived that the Livestock Yards Exchange Hotel, across the road from the office of Swift and Company.

(Testimony of Charles Phillip Gould, Jr.)

He and I were room mates for six to eight months. We were on very friendly terms and went out socially together. [132]

I recall the Saturday afternoon in 1934 just before Gray went on his vacation. I first saw him that day about 2:00 or 2:30 in the afternoon somewhere in the hotel. He was rather excited and came in and searched his room. He came into the lobby and I went upstairs with him. He made some statement to me and I was in the room while he was searching. I helped him. We went through the drawers, looked in one of the trunks, behind the trunks, under the mattress and various places in the room.

During the time I had been rooming with him, I had been present frequently on occasions when he came home at night with his collections. I knew that on occasions he kept his collections in the room. Sometimes he would make out his reports, put them in an envelope, and turn them in the next morning to the plant. Over night he would seclude it in the room under the pillow or throw it on the dresser top or in the dresser drawer or lay it somewhere where he could remember.

Coming back to that Saturday afternoon, after he and I had done the searching, we went over to the office. I don't recall whether Mr. Harbinson came in with us. The only person I can remember of being in the office when we got there was Jack Hamilton, cashier. Sometime while we were in the office Mr. Harbinson was there. I talked to

(Testimony of Charles Phillip Gould, Jr.)
Jack Hamilton first and to the janitor. I asked if he had emptied all of the waste paper baskets, and he had, and I went outside to search the trash cans wherein I thought the missing tickets or missing stubs might be.

I recall that Harry Gray wrote out a list of names and the amount of money which he could recollect approximately of these tickets that had disappeared. He gave this list [133] to Mr. Harbinson and told him in substance to take this list, see the customers and check up as to the amounts, and that when Grey returned from his vacation he would make up the difference to the company if they so demanded. It was Gray who told Harbinson that, on that afternoon.

On Monday, October 15th, about 10:00 or 11:00 o'clock, Mr. Zigler called me up. Mr. Zigler was in charge of the Bedaux Department in the plant and was my superior. He said that Mr. Hartl over in the office wanted to see me. I went over to see Mr. Hartl after lunch. Mr. Hartl told me that there had been missing tickets; that the accounting department had the numbers which corresponded to the missing tickets, although they did not have the tickets, and he asked if I would go out into the territory and try to locate these tickets,—by that, I mean sales invoices. I was familiar with the system of sales invoices that they used. Each one had a number. Mr. Hartl gave me a list of numbers. He instructed me to start in South San Francisco

(Testimony of Charles Phillip Gould, Jr.)
and to go down the Peninsula and call on Swift and Company's customers. I was familiar with that route as far as Broadway as I had worked it before. On that occasion Mr. Hartl also definitely instructed me in approaching these customers to be very careful about saying anything that would injure Swift and Company's standing with the customer. He asked me to bring back copies of these tickets if I happened to find them at the customers. He told me those numbers included the numbers of the collections on Friday of Harry Gray's route. There were some other numbers besides that.

I then started out Monday afternoon and called on the customers. I kept up the calls until Wednesday or Thursday of that week. After I completed those calls, I gave Mr. Hartl a [134] copy of the tickets that I had been able to obtain.

I saw the list which is marked Defendant's Exhibit C during the period we have been discussing. It was given me by Mr. Harbinson, in whose possession it was, sometime during that period. I turned it in to Mr. Hartl at the end of my investigation.

The first customer I called on was Pete's Grill in South San Francisco. The conversation was as follows: I told Pete that I had been sent out to check the list of numbers, that there had been some missing tickets and the company had asked me to get a copy of these tickets, and if he did not mind, I would like to see his invoices. He dug down into

(Testimony of Charles Phillip Gould, Jr.)
a cigar box and threw them onto a counter, and I went through them and he went on about his work. That was the only conversation I had with him.

In sum and substance, the conversation I had at other places was the same as with Pete. In some instances there was no conversation at all, except substantially that. Some of the customers asked me why I wanted the tickets, and in reply I explained to them that there had been these missing tickets, the company wanted to straighten out their accounts, and that I had been asked to try to get copies of these tickets.

I did not state to any of the customers that Harry Gray had failed to turn in money or that he had stolen money or any words to that effect or that he was short in his accounts. I did not say that he was short.

Referring to Guptill's Cafe in Broadway, Burlingame, I had had meals there before, but only about four or five times. As for the conversation had with Mrs. Guptill, whatever was said, she said it all to me. She asked no questions about why I wanted [135] these receipts. From what she said, I assumed she already knew. I do not remember what she said, except that she had heard about it and knew all about what I was there for. She gave me the tickets I wanted without any trouble.

The signature on the document introduced in evidence as Defendant's Exhibit A is mine. I signed it on the day when I saw Mr. Harbinson with Mr.

(Testimony of Charles Phillip Gould, Jr.)
Hogan in Sacramento. The interview took place in a luncheon place in Sacramento about the middle of the day. What was said at that time between Mr. Hogan and Mr. Harbinson was this: Mr. Hogan asked Gene about the particular case, and as Mr. Harbinson responded, Mr. Hogan wrote it down on that particular paper, Defendant's Exhibit A, and after he finished, Mr. Hogan gave it to Harbinson to read and to see if it was O.K. Mr. Harbinson said it was all right. There was some discussion about whether he would sign it. Mr. Harbinson said he did not want to be involved in the case, and he felt that if he signed anything he probably would have to be a witness, and he did not want to be down here, or have anything to do with it unless he absolutely had to, and he therefore said he would not sign it. He raised no question about the accuracy of that statement.

I was sober on that day, and Mr. Hogan certainly was sober. He gave no indication of being intoxicated. He may have had a couple of drinks. All I had was some beer.

With respect to my calls down the Peninsula, I do not recall a man by the name of Langbehn. I do recall an occasion when I called on someone in San Carlos and went with him in an automobile to obtain the tickets I desired. I did not say to that man that it seemed that Harry Gray had taken some of Swift's money just before he went on his vacation, and [136] they wanted to see just how much he had

(Testimony of Charles Phillip Gould, Jr.)
taken. I did not say that it sure looked kind of bad for Harry because it was here the day before he was supposed to go on his vacation and his cash was missing. I did not say anything to that effect. I had absolutely no feeling of ill will or desire to injury Harry Gray at any time.

Cross Examination

I recall an occasion when I had a conversation with a man whom I now suppose to have been Mr. Lengbehn. That is, I recall having called on a store and gone to somebody's house in my car with a man, but I don't know whose place it was. I don't believe when we got there he had any of the tickets I was looking for.

What I said to him when I went into the store by way of telling him what I was there about was that I was with Swift and Company, introducing myself, and that I said I was looking for tickets. I did not say Gray was short some tickets or that he had not turned in some tickets. What I said was that there were some missing tickets, and I wanted to find out where they were.

We got in a car and we rode up to a house. I don't believe we discussed the matter at all on the way. While we were at the house, we did not discuss the matter. I don't recall whether I brought him back to the store.

(Testimony of Charles Phillip Gould, Jr.)

The only thing I told him was that when I went in to the store I said I was looking for missing tickets in Gray's territory and wanted to know if he had any of them, and other than that, I did not discuss what my business was there that morning. [137]

I went to other places; after introducing myself, I told the people that I had been sent out by the company to trace some tickets, and if they wouldn't mind, I would like to see their invoices. My best recollection is that there were some who asked me why I wanted to see their tickets. In reply I told them tickets were missing; that I had this particular list which had been given to me, and I wanted to check them and that the company had to straighten out their accounts. I was not looking for just missing cash sales tags. After two days, it simmered down to cash tickets, but prior to that it had been credit tickets as well as cash tickets.

I had a list of the numbers missing; and when I went into a person to ask about tickets, I did not ask just for those the list showed were missing, but asked them for their previous two weeks' tickets, because I had numbers prior to the time in question, and I had been asked to try and find those, too, and in some cases I went through as much as a month's tickets, but I wasn't interested in tickets other than those my list showed as missing.

My list did not show the names of the purchasers on the missing tickets.

(Testimony of Charles Phillip Gould, Jr.)

Referring to the time when the statement was taken at Sacramento, Mr. Hogan, Mr. Harbinson and I were together for a period of about a half hour or forty minutes. Mr. Hogan and I had plenty of time, but Harbinson was in a hurry to get back to the ranch and didn't stay very long.

When I talked to Mrs. Guptill, she seemed to know all about this matter from somebody. You ask how the conversation came around to the discussion of what this matter was about when I was talking to Mrs. Guptill. I didn't bring it up at all. [138] She did all the questioning and answered almost all of her own questions. I told her nothing whatsoever. I was there about ten minutes. I drew the conclusion that she seemed to know all about it because she asked me what it was going to mean to Harry. She didn't know what the trouble was about and neither did I. I was trying to find out. All I knew was that there had been missing tickets, and there was money and collection blanks for that money covered by them.

I had been there in the afternoon at the plant and heard Mr. Gray claim to have put them in the cage, and Mr. Hamilton claimed they weren't there.

I did not tell Mrs. Guptill there was money that hadn't been turned in. I didn't tell her anything about the money. When I say that she seemed to know what it was all about, I do not mean that she seemed to know that money was not turned in. She never asked about that.

(Testimony of Charles Phillip Gould, Jr.)

I had known Harry Gray for quite a long while. I had roomed with him. I was personally very much interested in what I learned on this investigation trip. But it was immaterial to me what the people seemed to have said and heard about it. It was immaterial to me what had been said concerning the trouble my friend was in. I didn't care what anybody else thought. You bet your life I liked Gray and was very fond of him, and I didn't care what people were saying about him.

When that statement was taken up in Sacramento it was read by Mr. Harbinson himself. Having read it, he refused to sign it, and it was then Mr. Hogan added to what he had written the statement that appears at the bottom of the paper, "This statement taken in the presence of Mr. Chas. Gould and Mr. Hogan and the same is true and correct." [139]

I quit Swift and Company a week ago last Friday, because I had something better.

I don't recall Dorothy Kipps at all. I believe she was a waitress in Guptill's place, but I don't recall her. I had absolutely no conversation with her at all about this matter.

I want to be understood as saying that I never said to Mr. Langbehn anything about Harry Gray having taken any money or having been short when he left on his vacation. I don't recall my entire conversation with him, but I clearly recall that I did not tell him that Harry Gray had taken money before he went on his vacation and that I was try-

(Testimony of Charles Phillip Gould, Jr.)
ing to find out how much he had taken. I definitely know that I did not say anything about that.

Redirect Examination

When Mr. Hogan and I were in Sacramento in the cafe, we were there about a half hour before Mr. Harbinson came and about twenty minutes or so after he left.

I recall that I said in answer to cross-examination that I wasn't interested in what people thought about Gray. What I meant by that was this: This was the way I felt about Harry,—any trouble that he was in I knew that I could solve it,—and what anybody else said about him, it didn't mean anything to me, because I knew down inside myself that everything was all right, and I was going to find out for myself and I wasn't paying any attention to anybody else.

I don't remember the details of the conversation that I had with the several customers. It is a fact that in some cases the customers gave me the slips without asking any questions [140] about it. I do not recall how many asked me why I wanted them.

Recross Examination

I never did believe at that time or at any time that Harry Gray had been guilty of taking the money of the company.

Thereupon the defendant called as a witness on its behalf

LLOYD J. DEERING,

who testified as follows:

Direct Examination

I am employed by Swift and Company of South San Francisco, and have been with them since September, 1924. In 1934 I was the night order clerk. My office hours were 12:15 until 7:45 P. M. and generally I was there later than that three nights a week. I know Harry Gray and recall that in 1934 he was employed by Swift and Company as a truck salesman.

When Mr. Gray took over the service truck on the Peninsula, it was the custom of all drivers to turn their money into me when they came into the plant in the evening; and when Mr. Gray first took over the job he did turn his money in, but in the latter part of his employment with the company I did not receive any money from Mr. Gray.

There were other salesmen and truck drivers who turned in their money to me when they came in. When they gave me money, I counted it and made out an envelope showing the cash collection, the amount of the checks and the total collection. I typed the name of the driver or salesman on the envelope and sealed it and placed it in a strongbox in the vault. I would lock the vault when I went home.

Mr. Gray never asked me for a receipt for the money [141] he turned in. I never refused him a receipt.

(Testimony of Lloyd J. Deering.)

Cross Examination

I can't ever remember giving Harry Gray a receipt.

When money came in from any wagon driver, I did not give him a receipt acknowledging that I had received it. It wasn't the practice at that time for me to give receipts.

If Gray had asked me for a receipt signed myself acknowledging that I had gotten so much money from him, I would have given him a receipt. I had no reason to refuse to give him one. No driver ever requested a receipt of me. It is a fact that a good many of the drivers came in too late to turn their money into the cashier; and also that some of them did not turn it in to me. Among others was Harry Gray, after the first few months. But it was not a common practice for drivers not to turn in their money to me when the cashier was gone. If I was there, I accepted their money. Of course, if I wasn't there, they didn't turn it in to me. I was there at night when most of the drivers did get in. I was not always there when the drivers got in, and there were times when neither the cashier nor myself were there when the drivers got in. I don't recall refusing a receipt to Harbinson or that he ever asked for one.

At the time when I took over this night clerk's job from another clerk, I took over the duties without any instructions at that particular time to give a receipt. It was my duty to receive the money from

(Testimony of Lloyd J. Deering.)

the drivers if I was there. When they did not turn it in to me, I did not report that to my superiors. I had no authority to go to the drivers, and say, [142] "Give me the money."

I was informed that it was my duty to take the money from the drivers by the clerk that preceded me in the night order clerk's job. When I took over that job, he handed me the keys to the strongbox and the locker in the vault and told me that if I received any money from any of the salesmen or the truck drivers, I was to place it in this strongbox and the cashier would get it the next morning.

I did not have a special receipt book that I used for the purpose of giving receipts to the drivers who left money with me. I had no form of receipts.

Redirect Examination

After I leave the plant at night, there is a night watchman there all night, and he receives the money that comes in after that time from the truck drivers. I know of my own knowledge the practice that these drivers used to turn money in to the night watchman late at night.

I had observed my predecessor as night clerk taking money from the drivers. I knew that as a matter of regular practice, evening by evening, he was taking money from the truck drivers.

On an average three to six truck drivers would bring their money in, each evening, to me; it would depend on the day of the week. The drivers that

(Testimony of Lloyd J. Deering.)

turned money in to me at night were country drivers; there are certain routes on which we make deliveries on certain days of the week and not daily.

I am familiar with the form of collection report and with the fact that each page has a triplicate, consisting of a white copy, a yellow copy and a tissue. The practice with [143] respect to these salesmen who turned in their money to me and getting a receipt was this: each driver had a folder into which the collection book fits. The folder had two pockets. When the driver brought in the money, I counted it. I would make out my envelope showing the cash, checks and the total collection, with the name of the driver, and I would place the envelope in the other pocket of the folder. Then the cashier would put the receipt on the tissue when he received it. The tissue remained in the book and would be returned to the driver as his receipt.

Recross Examination

I knew that the night watchman took the money from the drivers when I wasn't there, because at times when I was going home I would meet a driver coming in who had money to turn in and would tell him to give it to the night watchman, and I know that they did, because I saw them.

Thereupon the defendant called as a witness on its behalf

HAROLD A. HARTL,

who testified as follows:

Direct Examination

I am employed by Swift and Company and have been for many years. I have held the office of auditor and office manager for about five years and occupied that position during the year 1934.

My duties as office manager are to take charge of the accounting, to have charge of the people in the accounting department, and as auditor to audit all accounts throughout the plant and customer's accounts, receive cash and so [144] forth. That includes any question of discrepancy of accounts with the salesmen.

I know Harry J. Gray. I was not present on Saturday afternoon, October 13, 1934, when he went on his vacation.

On Monday morning the cashier came to me and told me that he had not received Mr. Gray's collections for Friday. On Monday morning we then immediately checked the sales ticket numbers to see which tickets were missing from the Friday collections. In that connection we referred to what is sometimes called a "checkerboard". That is this document entitled "Daily sales ticket report." That is the form. When a salesman is given an invoice book, the pages are consecutively numbered. The salesman's name is placed at the top of one of these

(Testimony of Harold A. Hartl.)

checkerboard sheets. The sheet contains a list of numbers; as the tickets are received and go through our work we check off the numbers on the checkerboard.

On Monday morning I ascertained that certain of Gray's tickets were not received in the office. Then I called in Mr. Gould. I asked permission to use him to check these tickets, to go around among our customers to see if he could locate these tickets that corresponded with those numbers. Instructions were given Mr. Gould merely to go into the customer's store and ask if he might be permitted to look at the tickets. I told him if he found the tickets, he was to make a copy of them and bring the copy back. He subsequently brought to me a report.

I never gave any instructions to Mr. Harbinson on that subject. I never discussed the matter with Mr. Harbinson.

I recall that Mr. Gray returned from his vacation on the 29th of October. I saw Mr. Gray that day and was subsequent- [145] ly present at an interview with him. On that occasion I did not say that I had it in black and white and that he would be blacklisted if he didn't pay the money. In substance what I told him was that it wasn't a question of anything except that this money had not been turned in to us, we had not received it, and therefore any moneys collected by anyone in the employ of Swift and Company belonged to Swift

(Testimony of Harold A. Hartl.)

and Company and the were not relieved of responsibility until they had turned it in.

I told him that he knew the rules of the company, which were to turn the money into the company each night. He said in that regard that the reason why he did not do it was that he claimed he got in late, and he had certain reports to make out, and he was hungry and stopped in South San Francisco for dinner, then returned to his hotel room and made out his reports, and by that time it was too late to check in to the night clerk. I told him that we didn't accuse him of anything except carelessness, and he admitted he was careless.

Cross Examination

In our system there were also the receipt or collection pads which contained a record of the cash collected. It contained a record of the person from whom the collections had been made, and the date, number, amount of the invoice that had been given to the customers. The number of the invoice was to be entered on it, if it were filled out properly. I don't know whether the missing tickets appeared on the collection pad because we did not have the particular collection pad. The collection pad remains the property of the salesman. I never saw any collection pay that had missing numbers on it.

[146]

I never accused Mr. Gray of anything except carelessness. I never accused him of taking any

(Testimony of Harold A. Hartl.)
money and converting it or embezzling it or steeling it. The discussion I had with Mr. Gray was lengthy but all repetition. The repetition was that he was concerned and repeatedly said he wanted me to answer him as to whether I thought he took the money or not. My reply was that it wasn't a question of whether he took it or not, the question was we had not received it. He brought up the matter of Hamilton. He said he had thrown the money into the cashier's cage; that after he left the office, the next one in the office was Hamilton, and that therefore in his mind it resolved itself into the fact that somebody took the money, and that if he didn't take it, Hamilton must have. I replied that Hamilton was a trusted employee, and we couldn't entertain anything like that. I replied that we were not accusing Mr. Gray of taking the money, that we never did and were not doing it then. After he made this claim to me that he put the money in Hamilton's cage and after he claimed that it was a situation whether it was he or Hamilton and told me he thought Hamilton was the man who took the money, we made no special audit of Hamilton's accounts for the reason that there is a regular monthly audit made and filed every month, and Mr. Hamilton's accounts had just been audited within the two weeks' period following October 13th. The audits disclosed no irregularity. We never had an audit of his disclosing an irregularity until a long time afterwards. The audit that we made was thorough

(Testimony of Harold A. Hartl.)
and would have disclosed an irregularity if there had been one at the time this occurred. The discrepancy that later occurred through Mr. Hamilton occurred during a time in 1935.

Under our rules a man would be discharged of responsi- [147] bility as soon as he had turned in the money he had collected to the person who had been designated to receive it. The person designated to receive it, after the cashier had left for the day, was our night order clerk up to eight o'clock at night. Our night watchman was designated to receive it after the night order clerk had left, and at times did receive it. The form of receipt was the tissue in the collection book. The tissue is retained by the man who turns in the money as a permanent record in his book, and the book belongs to him. The person receiving the money was to count it, see that the right amount was entered on the collection pad and receipt the pad. That was one of the duties of the night order clerk. I am not sure whether I ever discussed the matter with Mr. Deering. I may have told his predecessor who then turned the night order clerk's work over to Deering and gave him the same instructions.

Referring to the Monday morning before I sent Mr. Gould out, Mr. Hamilton had come in and told me that he had not received Gray's collections for Friday, and I spent sometime checking up before Gould was sent out in the afternoon. All I knew at

(Testimony of Harold A. Hartl.)

that time was that we had missing tickets. At the time Gould went out, I had no idea what their dates were. Subsequently we found that they went back about three weeks.

In my interview with Mr. Gray after he came back from his vacation, I took him back in the vault, and let him go through the records; I told him that we had missing tickets in the middle of books, and he saw the spaces in between these ticket numbers. He asked me if he might make an investigation, and I made it with him, that is, the investigation in the office.

When the collection pad comes in, two copies are turned in from the salesman. Those copies show the name of the party [148] from whom the collection has been made, whether or not it is a check, and the amount of the cash collection. It is a record of cash collected, and it should show the number of the sales ticket. The cash collection reports are filed away as part of our cash. There was nothing over this period of three weeks that informed us of the missing tags. We had a clerk in the invoice desk who actually did the work of posting from the tickets on to the checkerboard. He was supposed to do it every day. Occasionally, as happens in all businesses, during vacation time we did not have the same class of help as relief and we occasionally get a little bit behind, and that is then caught up.

(Testimony of Harold A. Hartl.)

Redirect Examination

The receipts which we furnished were these collection report books. The books are carbonized. The tissue remains in that book as the property of the person turning in the cash as his receipt.

I never heard Mr. Kelly state that Mr. Gray was engaged in a build-up or words to that effect.

Thereupon the defendant called as a witness on its behalf

JAMES A. WHITE,

who testified as follows:

Direct Examination

I am the Pacific Coast general manager for Swift and Company. I held that position in 1934, and I have general charge of the operations of the Swift and Company on the Coast. The head office is in South San Francisco. We have there about 700 employees. In case a discrepancy occurs or a question arises [149] with respect to collections or accounts of salesmen, it falls in the department of Harold A. Hartl to investigate and pass upon that question. He held at that time the position of office manager and accounting.

The sales manager or the assistant sales manager would have no duties at all in a matter of a discrepancy of that kind.

(Testimony of James A. White.)

I recall that after Harry Gray returned from his vacation in 1934, I had a talk with him. I have a private office and a desk outside the office. I was at the outside desk, and Harry stopped at the desk and wanted the privilege to go through our records. I referred him to Mr. Hartl. That is the only conversation I had with him at the time. A very short time later he came into me again. He said he was honest and hoped I thought he was, and I told him, "Harry, I have developed enough information on this to satisfy myself that you were only careless, and we have so adjusted our records." I don't recall whether he then said anything about a job or not. It was just a short conference and he left. A few days later he came in and said something about taking care of this discrepancy and wanted to know about his job, and I said to him, "Well, I have discussed this with the sales department, and we don't think it is advisable for you to go back on your job. Harry, you go out and take a job in the plant, and I will see what we can do for you later on." He did not take the job in the plant, and I have never seen him since until now.

Cross Examination

While Mr. Gray was on his vacation, somebody told me about the discrepancy, and I just answered that Harry would [150] probably take care of it when he got back. I had given no instructions that he was to come and see me. He just stopped at my

(Testimony of James A. White.)

desk when he got back. It was not while he was away that we made the determination that when he got back that he couldn't go back on his job. After he returned he went to see Mr. Hartl. They discussed this thing, and Harry agreed to take care of the discrepancy, and Mr. Hartl came in to see me, and I said, "Well, you instruct our people in Chicago that this matter was only carelessness and that Harry Gray's record was clear and that they could put him out in the plant if they wanted to, as far as we were concerned." We didn't think it advisable for him to go back on his old job. It was carelessness, and that was our reason. I knew what the carelessness consisted of,—in not turning in his collections regularly.

Mr. Hartl came in and talked to me and said that Gray's collections had not been turned in, that they were making an investigation, and when the investigation was completed, he came and told me it developed into carelessness. I was not familiar with the details. He did not tell me that they knew where the money was. He did not tell me that Gray had taken the money. What he told me was that Harry wasn't quite sure what he did do with the money, but that Harry thought that he had put it in the cashier's cage.

I was interested in Harry because he had come to me with a recommendation from one of the managers in Edmonton, Canada, and I was interested in learning about his progress. I discussed the matter

(Testimony of James A. White.)

briefly with Mr. Hartl, and he said that Harry had taken the position that he had put it in the cashier's cage; that there was considerable running and looking about; [151] that Gray had gone back to his hotel; that he thought he might have left it there, and that they then looked through trash cans and around the office and couldn't locate it. Then Harry came to me and said he was satisfied he was careless and wanted me to give him another chance. I said that I would see that he was put on in the plant. He told me he was careless, and he considered that he was careless in that he had not turned in his collections. He did not tell me that there were many times previously when he had turned them in, just as he had turned it in this time. He did not say anything about the other drivers doing the same thing. I recall no conversation with him about Mr. Hamilton being, in his opinion, the one who had taken it. The farthest he went with me was that he thought he had put it in Hamilton's cage. He did not state that under his recollection of what he did, it was either he or Hamilton who had taken it. The only time I recall that he ever accused Hamilton was sometime later when he wrote me a letter from Los Angeles. The letter is in evidence as Defendant's Exhibit H. I don't recall any further conversations with Mr. Gray.

(Testimony of James A. White.)

Redirect Examination

When Mr. Gray told me that he thought he had put the money in the cage, I had been informed prior to that time by Mr. Hartl that Gray had gone over to his room looking for these collections. I heard that he had been looking in the room and in the trash can. That is the only recollection I have about it.

Thereupon the defendant called as a witness on its behalf

CHARLES MARTIN JOOS, JR.,

who testified as follows: [152]

Direct Examination

I live in Hayward, California. In 1934 I was living in San Mateo. I was in the meat business at that time with the Peninsula Stores. I knew Harry J. Gray, driver and salesman for Swift and Company. I did business with him. On occasions I called him "Jesse James." How I happened to call Mr. Gray Jesse James was more or less over a bottle of Coca Cola. He would come in there, and the fellow who worked with me and I would both match Mr. Gray for a bottle of Coca Cola, and naturally, if Mr. Gray had a little luck there, when we could not stick him, we would call him "Jesse James," and say, "All you need is a horse," or something like

(Testimony of Charles Martin Joos, Jr.)

that in a joking manner. I absolutely did not call him "Jesse James" after he left the employ of Swift and Company.

No one from Swift and Company ever made any remark to me disparaging to the honesty of Mr. Gray.

I once saw Mr. Gray after he had left the employ of Swift and Company. He dropped in either on Monday or Saturday morning to say goodby to me, and said he was going to Los Angeles, and I wondered why. He told me that tickets or tags were misplaced when he turned in, and that is as far as it went. We did not call him Jesse James when he came in, for the simple reason that he did not have on his frock that he had on when he was working as a salesman. He came in all dressed up, and naturally we wondered why he was dressed up, and therefore "Jesse James" was not brought up again.

He told me he was leaving Swift and Company by request.

I absolutely did not hear anyone make a remark disparaging to the honesty of Mr. Gray. [153]

I am known as "Bud" Joos.

Thereupon defendant closed its case.

The foregoing was all the evidence introduced on the trial of this cause.

Thereupon the defendant made a motion for a directed verdict as follows:

"Mr. Harrison: I move, if the Court please, that the jury be directed to return a verdict for the defendant on the ground that it appears by uncontradicted testimony that the statements here complained of are privileged in character and that it appears without contradiction that there was no actual malice, and particularly on the ground that it appears that the statements complained of were made by one who is interested in the communication to another person interested in the communication and were made by a person interested and who was requested by the person interested to give the information.

"I assign as an additional ground for a directed verdict for the defendant in this case that the uncontradicted evidence shows that the communication here involved is a privileged communication having been made by a person interested therein to another interested therein, and on the further ground that it was made in response to an inquiry, and on the ground that the uncontradicted evidence shows absence of express malice.

"And further, on the separate ground that there is no proof showing, or tending to show, that the persons who are alleged to have made the statement had authority so to do, or that they made the statements in the course of their employment, or that either of them made the statement under the authority of the defendant." [154]

Thereupon the Court denied the motion, to which ruling the defendant by its counsel then and there excepted.

Thereupon counsel presented their closing arguments to the jury.

Thereupon the Court gave the following instructions to the jury:

"Charge to the Jury.

"The Court: (Orally): Gentlemen of the Jury, this action is brought by plaintiff, Harry J. Gray, against defendant Swift & Company, to recover damages for an alleged slander. Plaintiff asks for special damages in the sum of $2000 and general damages in the sum of $50,000, a total of $52,000.

The pleadings admit that the defendant is a corporation doing business in the State of California, and that for some time prior to the 12th day of October, 1934, plaintiff had been an employee of the defendant in its packing plant in the city of South San Francisco. Plaintiff claims that on or about October 16, 1934, the defendant, through its agents or servants spoke of and concerning him certain words which are set out in the complaint. Defendant denies that it ever spoke these words, or any of them.

It is the duty of the Judge to instruct you as to the law that is applicable to this case, and it is your duty as jurors to follow the law as given to you in these instructions. On the other hand, it is your exclusive province to determine the facts in the case, and to consider the evidence for that purpose.

You are the sole judges of the effect and value of the evidence. You are not bound to decide in con-

formity with the declarations of any number of witnesses which do not pro- [155] duce conviction in your minds against a lesser number, or against a presumption of law, or evidence, which satisfies your minds. In other words, it is not the greater number of witnesses which should control you where their evidence is not satisfactory to your minds as against a lesser number whose testimony does satisfy your minds.

The testimony of one witness entitled to full credit is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony even though a number of witnesses on the other side might testify to an opposite set of facts, if from the whole case the jury believes that the greater weight of the evidence, considering its reliability and the credibility of the witness, is on the side of the one witness as against the greater number of witnesses.

In civil cases such as this a preponderance of evidence is all that is required; that is, such evidence as when weighed with that opposed to it has more convincing force. In weighing the testimony you are to consider the credibility of witnesses who have testified in the case. You are the sole and exclusive judges of their credibility. For the purpose of determining the credibility of the witness you may take into consideration their conduct, their character as shown by the evidence, their manner on the stand, their relation to the parties, if any, their interest in the case, their bias and prejudice,

if any, their degree of intelligence, the reasonableness or unreasonableness of their statements, and the strength or weakness of their recollection.

A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which the witness testifies, by the character of his testimony or what [156] the witness' motive is, or by contradictory evidence. A witness false in one part of his testimony is to be distrusted in others. That is to say, you may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point, and if you are convinced that a witness has wilfully sworn falsely you must treat all of his testimony with distrust and suspicion and reject it all unless you shall be convinced, notwithstanding the base character of the witness, that he has in other particulars sworn to the truth.

You should not consider as evidence any statements of counsel made during the trial, unless such statements, or statement, is an admission or stipulation conceding the existence of a fact or facts. You must not consider for any purpose any evidence offered and rejected, or which has been stricken out of the record. Such evidence is to be treated as though you had never heard it. You are to decide this case solely upon the evidence that has been introduced before you and the inferences which you may deduce therefrom, and such presumptions as the law may deduce therefrom, as stated in these instructions, and upon the law as given you in these instructions.

The burden of proof rests on the plaintiff to prove by a preponderance of evidence all of the affirmative allegations of the complaint, which include the allegation that defendant made the statement concerning the plaintiff to which he refers in his complaint. The term 'preponderance of evidence' is more than a mere form of words, and has a real meaning. It means that if the weight of evidence is in favor of the defendant, or if it is evenly balanced, your verdict must be in favor of the defendant as against the plaintiff.

Slander is a false and unprivileged publication other [157] than libel which charges any person with crime or tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or of imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profit, or which by natural consequence causes actual damage.

Every person has, subject to the qualifications and restrictions provided by law, the right of protection from defamation. Defamation is effected by slander. There cannot be a slander, in the legal sense of the term, unless the statement made is false. A mere statement of the truth does not give rise to any cause of action, no matter how disparaging it may be.

Plaintiff alleges in his complaint that the agents or servants of defendant made a statement of and concerning him as follows:

'Harry'—meaning the plaintiff—'is short in his account with the company. He has been taking the company's money. He has collected money of the company and has not turned it in.'

The plaintiff further alleges that such words were understood by the persons to whom they were spoken to mean that the plaintiff was guilty of embezzling the funds of the defendant. The defendant denies that any such words were spoken by it. It further denies that if such words were spoken they were misunderstood by such persons to have such meaning.

I instruct you that it is for you to decide, in view of all of the evidence, whether such words, if in fact they were [158] spoken by the defendant through its agents or servants, were understood by the person to whom they were spoken as charging the plaintiff with embezzlement, or only as imputing irregularity or carelessless not amounting to a crime. If you find that, under the circumstances, such words were understood by the persons to whom they were spoken not as charging embezzlement, or any crime, but only as charging carelessness or innocent irregularity, then I instruct you that the meaning of such words would not constitute a slander, and that plaintiff would have no right to recover by reason of the fact that such words were spoken.

You are not in this case to concern yourselves with the question of whether or not the plaintiff was guilty of taking money belonging to defendant

Swift & Company. The defendant does not claim and does not allege that the plaintiff embezzled any of the money. You are not to concern yourself with the question of whether moneys belonging to the defendant were stolen, and, if so, by whom they were stolen. Those are not issues in this case. The issue in this case which you are to decide is nothing more nor less than the question of whether the defendant corporation, Swift & Company, through its agents or servants, uttered and published statements concerning the plaintiff of a nature such as to be deemed slander in law, according to the other instructions which are given you. If the defendant, through its agents or servants, did not publish any slander about the plaintiff, your verdict must be in favor of the defendant, irrespective of whether the plaintiff was innocent or guilty of embezzlement. The utterance of words, although derogatory, does not in itself constitute slander within the meaning of the law, and no damages can be recovered unless [159] there has been what the law calls publication of those words. That is to say, unless the words are communicated by the defendant to some third party, someone besides the plaintiff or the defendant itself. Where statements are made by certain officers or employees of a corporation to other officers or employees of the same corporation in the course of the company's business, and where they are not communicated to others besides the plaintiff by those speaking the words, then there is no publication of the statements by the corporation. In such

a case the company cannot be held in damages as for slander.

The defendant is not liable for every speech made by its agents or servants, but only for such statements as are made within the scope of the agent's or servant's employment, and in the performance of his duties of transacting the business of the corporation. The fact that an employee at the time he makes a derogatory remark about another happens to be engaged in performing some service for his employer is not enough to make his employer responsible for such remarks, owing to the facility and thoughtlessness with which individuals sometimes make derogatory remarks to others. If an employee of a company indulges in such conduct his remarks should not perhaps be imputed to the company as readily as acts done in more deliberate circumstances. That is, they should not be so readily considered as being within the scope of the agent's employment. In order to charge the employer, those remarks must be made in connection with the very same duties which the employee was engaged in or instructed to perform for his employer at that time. In other words, the employee must be engaged or assigned by his employer to act upon or in relation [160] to the very subject matter with which the remark is connected at the very time the remark is made, otherwise the employer cannot be held responsible. If the employee does something which he is not employed to do, instead of something which he is employed to do, his employer is not responsible for what he does.

I instruct you that a man intends the natural consequence of his acts. If, therefore, the jury believes and finds from the evidence that the natural consequence of the publication complained of was to defame and injure plaintiff in his reputation, and character, you may properly infer such was the intention of defendant.

If you find for the plaintiff you must award him damages. You must award special damages in such sum as will compensate him for any loss of income from employment if you find from the evidence that he was unable, for any period of time, to obtain employment by reason of the alleged acts of the defendant, as set forth in the complaint. The evidence shows that special damages, if any, have been proved only to the extent of $750. In addition to special damages, if any, which you may award, you may, if you find for the plaintiff, award him such general damages as will compensate him for all the detriment proximately caused to him by the acts of the defendant as alleged in the complaint. Special damages may not exceed $750, and general damages may not exceed $50,000.

In an action for slander, the law implies some damage from the uttering of actionable words, and the law further implies that the person using the actionable words intended the injury the slander is claimed to effect, and in this case if you find for the plaintiff upon that part of the complaint al- [161] leging slander you will determine from all the facts and circumstances proved what damages

are to be given him, and in assessing the damages you are not confined to any mere pecuniary loss sustained. Physical pain, mental suffering, humiliation, and injury to the reputation of character, if proved, are proper elements of damage.

With respect to the matter of damages for mental suffering, if any, you are instructed that no damages may be awarded for mental suffering which is caused merely by the accusation complained of. Before any such damages may be awarded at all it is necessary for the plaintiff to prove that the alleged damage was the direct, immediate and proximate effect of the publication or communication of the alleged charge to third parties. In other words, if you find that the plaintiff was discharged from his employment by the defendant, or even if you find that the defendant made accusations to the plaintiff, himself, you are not by reason of those facts alone to award any damages to the plaintiff.

In case you should find a verdict for the plaintiff you should not award him any amount in excess of the actual damages, if any, which you find he has sustained. In this regard I instruct you that the amount prayed for in the complaint does not furnish any criterion for the amount of your verdict. The mere fact that a plaintiff has prayed for a certain amount of damages does not confer upon him a right to recover any amount greater than the amount of the actual damages, if any, that he has suffered.

If you find for the plaintiff you must make no allowance to him for exemplary damages. That is, for the sake of example and by way of punishment. In cases of this kind it is [162] usual for the court to instruct the jury as to the rule by which they should measure damages in case they should award any. The purpose of these instructions is to advise the jury upon the law as it affects the issues made upon the trial, but the jury are not to understand because the Court instructs them on the question of damages that thereby the Court means to convey any intimation that in this action the plaintiff is or is not entitled to any damages. These instructions as to damages are meant to apply only in case the plaintiff is found to be entitled to a verdict.

You must weigh and consider this case without regard to sympathy, prejudice or passion, for or against either party to the action. It is the duty of the jurors to deliberate and consult with a view to reaching an agreement, if they can do so, without violence to their individual judgment upon the evidence under the instructions of the Court. Each juror must decide the case for himself, but should do so only after a consideration of the case with his fellow jurors, and he should not hesitate to change his views or opinions on the case when convinced that they are erroneous. No juror should vote for either party nor be influenced in so voting, for the single reason that a majority of the jury should be in favor of said party. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the

mere purpose of returning a verdict solely because of the opinion of the other jurors.

There are submitted to you merely for your convenience two forms of verdict which are as follows: The first, after the entitlement of court and cause is: 'We the jury find in favor of the plaintiff and assess the damages against the defendant in [163] the sum of (blank) dollars,' and a place for the signature of the foreman. The other is, after the entitlement of court and cause: 'We the jury find in favor of the defendant,' Also, with a place for the signature of the foreman. Your verdict must be unanimous, and when you have arrived at a verdict it will be properly filled out and your foreman will sign it and you may return to court."

The charge to the jury above set forth comprises all the instructions given to the jury in the cause.

Of the foregoing instructions given, the following was given by the Court at the request of the plaintiff and was Plaintiff's Requested Instruction No. 6:

> "Slander is a false and unprivileged publication other than libel which charges any person with crime or tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or of imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profit, or which by natural consequences causes actual damage."

Of said instructions, the following was given at the request of the plaintiff and was Plaintiff's Requested Instruction No. 10:

> "I instruct you that a man intends the natural consequence of his acts. If, therefore, the jury believes and finds from the evidence that the natural consequences of the publication complained of was to defame and injure plaintiff in his reputation and [164] character you may properly infer such was the intention of defendant."

Of said instructions, the following was given by the Court at the request of plaintiff, and was Plaintiff's Requested Instruction No. 11:

> "In an action for slander, the law implies some damage from the uttering of actionable words, and the law further implies that the person using the actionable words intended the injury the slander is claimed to effect, and in this case if you find for the plaintiff upon that part of the complaint alleging slander you will determine from all the facts and circumstances proved what damages are to be given him, and in assessing the damages you are not confined to any mere pecuniary loss sustained. Physical pain, mental suffering, humiliation, and injury to the reputation of character, if proved, are proper elements of damage."

Prior to the giving of the charge by the Court to the jury and within the time allowed by the Court

under its rules and in full conformity to those rules, the defendant objected to the giving of said plaintiff's requested instructions on the following grounds:

To plaintiff's requested instruction No. 6 for the reasons and on the grounds that

(a) The complaint raises no issue as to any type of slander except an alleged accusation of a crime, namely, embezzlement. There is no issue raised as to any other type of slander. [165]

(b) There is no evidence in the case of any alleged utterances which tend to injure the plaintiff in respect of any office, trade, profession or business, particularly with respect to imputing any general disqualification.

To plaintiff's requested instruction No. 10 for the reasons and on the grounds that:

(a) It is a question for the Court and not the jury what the meaning and consequences of words are. (See defendant's Proposed Instruction No. 5, and authorities there cited.)

(b) The present is a case of qualified privilege (see defendant's Proposed Instructions Nos. 17, 21, 24, 25, and authorities there cited). In such a case malice must be proved, and there is no presumption of intention or malice inferred (Civil Code, Section 48).

(c) Even if this were not a case of qualified privilege, which it clearly is, it would be im-

proper to charge that an intent might be presumed because in such a case, intent would be immaterial, and the requested charge would be misleading. (36 Corpus Juris, p. 1214, Section 162.)

To plaintiff's requested instruction No. 11 for the reasons and on the grounds that:

(a) Defendant objects on all the grounds stated in the objection to plaintiff's requested instruction No. 10; and also

(b) Upon the ground that plaintiff has already requested the instruction that it is slanderous to [166] make a false communication which by natural consequences causes actual damage; the present requested instruction that the law implies some damages from utterances of slanderous words is, in the circumstances, question begging;

(c) The proposed instruction refers to physical pain of which there is no evidence and for which there may be no recovery in any event;

(d) The requested instruction will permit recovery of damages in the nature of punitive damages for which there can be no recovery. (See defendant's proposed instruction No. 30.)

At the conclusion of the giving by the Court of its instructions to the jury, defendant, by its attorney, did, in the presence of the jury and before they re-

tired to deliberate upon their verdict, take exception to the following instructions:

Defendant's Exceptions to Instructions of the Court to the Jury

The defendant excepted to the instruction referred to above as Plaintiff's Requested Instruction No. 6, as it was given and read to the jury, for each of the reasons stated above in defendant's objection to said instruction.

The defendant excepted to the instruction referred to above as Plaintiff's Requested Instruction No. 10, as it was given and read to the jury, for each of the reasons stated above in defendant's objection to said instruction.

The defendant excepted to the instruction referred to above as Plaintiff's Requested Instruction No. 11, as it was given and read to the jury, for each of the reasons stated [167] above in defendant's objection to said instruction.

The defendant, prior to said charge to the jury, and prior to the argument of counsel, and within the time allowed by the rules of said Court, and in full conformity to said rules, presented to the Court and requested the Court to give to the jury each of the following written instructions:

Instructions Requested by Defendant

Defendant's Proposed Instruction No. 5, reading as follows:

"The meaning of the language used in an alleged defamatory publication is in the first

instance a question for the Court to decide. Where language is unambiguous, it is the province of the Court to determine its construction and to determine whether it is capable of the defamatory meaning which the plaintiff claims for it. The plaintiff claims that the defendant said of him that 'Harry (meaning the plaintiff) is short in his accounts with the company.' The Court has considered these words, and it concludes that these words do not mean and are not reasonably capable of being understood to mean that plaintiff has been guilty of embezzling funds of the defendant entrusted to his care as an employee of defendant. I therefore instruct you that even if you find that the defendant spoke those words of plaintiff, nevertheless it cannot be guilty of slander, and you cannot render a verdict against the defendant on account of those words."

Defendant's Proposed Instruction No. 6, reading as fol- [168] lows:

"The plaintiff claims that the defendant said of him that 'He (meaning the plaintiff) has collected money of the company and has not turned it in.' The Court has considered these words, and it concludes that these words do not mean and are not reasonably capable of being understood to mean that plaintiff has been guilty of embezzling funds of the defendant entrusted to his care as an employee of defendant. I therefore instruct you that even if

you find that the defendant spoke those words of plaintiff, nevertheless it cannot be guilty of slander, and you cannot render a verdict against the defendant on account of those words."

Defendant's Proposed Instruction No. 12, reading as follows:

"Even if you find that the alleged remarks were made by some employee of the defendant and further that the employee had been sent out by the defendant to check the plaintiff's route, that is, to ascertain what sales had been made and what moneys had been collected by the plaintiff, nevertheless, it would not be part of the employee's duties nor connected with his assignment to utter the remarks complained of, and defendant cannot be held liable on account of such remarks."

Defendant's Proposed Instruction No. 14, reading as follows:

"The law does not hold an employer liable [169] for every defamatory utterance of an employee. It does not hold an employer responsible for every reckless, thoughtless or even deliberate speech made by an employee concerning or relating to other persons while he is in his employer's service."

Defendant's Proposed Instruction No. 16, reading as follows:

"If you find that some employee of the defendant uttered the alleged derogatory re-

marks concerning the plaintiff, that is not enough to make defendant responsible. If the employee who made such remarks was a salesman on a route, that fact would not by itself authorize him to speak for the defendant on the subject of the plaintiff and would not make the defendant responsible for any such remarks concerning the plaintiff, and if the employee did make such remarks in the circumstances described, they are his own responsibility."

Defendant's Proposed Instruction No. 17, reading as follows:

"Sometimes remarks are made in circumstances and on occasions which the law calls 'privileged.' If a remark is made on a privileged occasion, then even though it is not true and is defamatory, nevertheless it is not regarded as slanderous, and there is no liability unless the words were spoken maliciously, that is to say, with actual malice. If a statement or remark is made without malice by a person interested therein to another person interested therein, it is a privileged publication." [170]

Defendant's Proposed Instruction No. 18, reading as follows:

"If a remark, although not in fact substantiated in truth, is made in good faith and in an honest belief that it is true and without any desire or disposition to injure the party of

whom it is spoken and without any spite or ill will toward him, then it is not malicious, and if the occasion is privileged, there is no liability."

Defendant's Proposed Instruction No. 19, reading as follows:

"If a remark is made on a privileged occasion, the burden of proof is upon the plaintiff to establish by a preponderance of evidence that it was made with actual malice. If plaintiff fails to prove that such remark was made with actual malice, the verdict must be for the defendant and against the plaintiff."

Defendant's Proposed Instruction No. 20, reading as follows:

"In determining whether or not a communication to a person interested therein by one who is also interested is made without malice, malice is not to be inferred from the mere fact of communication."

Defendant's Proposed Instruction No. 21, reading as follows:

"Where the facts and circumstances under which an alleged defamatory publication is made are undisputed, the question of privilege is one for the Court. Even if you should find that the defendant uttered of [171] the plaintiff the words set out in the complaint, the circumstances under which they were said are

undisputed. The Court has considered the matter and instructs you that the occasions were privileged and that if the words were uttered without actual malice (if, in fact, there were any words said), then your verdict must be in favor of defendant and against the plaintiff."

Defendant's Proposed Instruction No. 22, reading as follows:

"Where a plaintiff seeks to hold a corporation liable for remarks made by an employee, the corporation cannot be held responsible for the actual malice of the employee, if there was any, unless it had expressly authorized the employee to slander the plaintiff maliciously, or knowing that he uttered a slander maliciously, authorizes and approves what he said. Consequently, if the occasion of an utterance is privileged within the meaning of the instructions already given to you, a corporation cannot be held liable for utterances of an employee unless first, those utterances were made with actual malice, and in addition, the corporation had expressly authorized the employee beforehand to make the utterance maliciously or thereafter approved of the utterance, knowing of its falsehood."

Defendant's Proposed Instruction No. 23, reading as follows:

"There is no evidence whatever that the de-
[172] fendant corporation ever expressly

authorized any employee to utter any of the remarks referred to in the complaint or ever approved of any such utterances, and I therefore instruct you that even if some employee did utter such remarks, no actual malice can be charged to the corporation. You will therefore return a verdict in favor of defendant and against the plaintiff."

Defendant's Proposed Instruction No. 24, reading as follows:

"If an employee of the defendant was sent out by the defendant to interview customers on the plaintiff's route for the purpose of checking up to ascertain what sales the plaintiff had made and what moneys he had collected, if any, then even if you should find that while engaged in that task such employee made the remarks referred to in the complaint to a customer, I instruct you that if the employee acted in good faith and in an honest belief that what he said was true and without any desire or disposition to injure the plaintiff and without any spite or ill will toward him, the remarks were privileged, and even if they were false and derogatory, the defendant cannot be held guilty of slander, and the plaintiff is not entitled to recover damages because of such remarks."

Defendant's Proposed Instruction No. 25, reading as follows:

"A communication, though in fact unfounded in truth, is privileged if made in good faith in

the [173] performance of any duty and with a fair and reasonable purpose of protecting the interests of the person making it or the interests of the person to whom it is made. I therefore instruct you that even if you find that the defendant uttered concerning the plaintiff the words complained of, yet if you find that those words were said in good faith in carrying out the company's business and with a fair and reasonable purpose of protecting the interests of the company, then the defendant cannot be held liable even though what was said was not well founded in fact."

Defendant's Proposed Instruction No. 26, reading as follows:

"Even if you find that some employee of the defendant, while checking the plaintiff's route, made an utterance concerning the plaintiff, as he alleges in the complaint, and even if you find that the utterance was false and made with actual malice, nevertheless you cannot hold the defendant corporation liable for such remarks, if any, unless such employee had been expressly ordered beforehand to go out and make the remark or afterwards the corporation learned that such a remark had been made and approved of it with knowledge of its falsehood."

Defendant's Proposed Instruction No. 27, reading as follows:

"There is no evidence whatever in this case that the defendant corporation ever expressly [174] authorized any employee to utter any of the remarks referred to in the complaint or ever approved of any such utterances, and I therefore instruct you that even if some employee did utter such remarks, no actual malice is chargeable to the corporation. Consequently, in the event you find that such utterances, if there were any, were made on a privileged occasion as has been explained to you, your verdict must be in favor of the defendant and against the plaintiff."

Defendant's Proposed Instruction No. 28, reading as follows:

"Even though you find that the defendant made the statements with respect to the plaintiff alleged in the complaint, nevertheless if you further find that the defendant was interested therein and that such statements were made by the defendant in a communication, without malice, to a person interested therein, I instruct you that the publication is a privileged one and that your verdict must be for the defendant. In determining whether or not the communication is privileged, you may consider all the facts and circumstances surrounding the transaction in order to determine whether or not the defendant was interested in the communication and whether or not the persons to whom the communication was made were also interested therein."

Defendant's Proposed Instruction No. 33, reading as [175] follows:

> "I instruct you that the defendant corporation, Swift and Company, cannot be held responsible for any utterances made or alleged to have been made by Mr. Harbinson. The Court finds that the evidence does not establish that Mr. Harbinson, if he made any of the alleged utterances, was acting within the course or scope of his employment."

Defendant's Proposed Instruction No. 34, reading as follows:

> "I instruct you that the defendant corporation, Swift and Company, cannot be held responsible for any utterances made or alleged to have been made by Mr. Gould. The Court finds that the evidence does not establish that Mr. Gould, if he made any of the alleged utterances, was acting within the course or scope of his employment."

The Court refused each and all of said instructions as requested by the defendant.

Thereupon, after the Court gave its instructions to the jury, the defendant, in the presence of the jury, and before they retired to deliberate upon their verdict, again requested the Court to give to the jury each of the defendant's requested and pro-

posed instructions quoted above, namely, defendant's Proposed Instructions Nos. 5, 6, 12, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 33 and 34, and defendant made said request as to each of said instructions severally.

The Court thereupon refused to give any of said in- [176] structions, and thereupon the defendant, by its attorney, in the presence of the jury and before they retired to deliberate upon their verdict, did except to the ruling of the Court in refusing to give to the jury said Defendant's Proposed Instructions Nos. 5, 6, 12, 14, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 33 and 34, taking exception severally to the refusal of each instruction.

Thereupon the jury retired to consider their verdict, and subsequently, on March 4, 1938, the jury returned into Court with a verdict in favor of plaintiff and against the defendant and assessing the plaintiff's damages at $1750.00.

Thereupon the defendant, by its counsel, on March 4, 1938, and before judgment had been entered upon the verdict, moved for judgment notwithstanding the verdict as follows:

"Mr. Harrison: I move for judgment in favor of the defendant, notwithstanding the verdict, on the grounds stated in support of my motion for a directed verdict, to wit, that the uncontradicted evidence in this case shows that any communications made were those of a privileged nature, by a per-

son interested therein to another person interested therein, without malice; secondly, on the ground that any communications made were not made by the defendant or by anyone authorized by the defendant, and that no communication was made by anyone within the scope of his authority."

Thereupon the Court denied said motion for judgment notwithstanding the verdict, and to said ruling the defendant then and there excepted.

Thereafter, on March 11, 1938, the Court made and entered its order extending time for preparation of the bill of exceptions as follows: [177]

"(Title of Court and Cause)

Order Extending Time For Preparation of Bill of Exceptions.

Good cause appearing therefor, it is hereby ordered that the defendant, Swift and Company, may have to and including March 29, 1938, within which to prepare and lodge a draft of bill of exceptions.

Dated: March 11, 1938.

A. F. ST. SURE
United States District Judge."

Thereafter, on March 26, 1938, the Court made its order further extending time for preparation of bill of exceptions as follows:

"(Title of Court and Cause)

Order Extending Time For Preparation of Bill of Exceptions.

Good cause appearing therefor, and it appearing that defendant has not yet received from the court reporter a complete copy of the reporter's transcript of the proceedings, it is hereby ordered that the defendant, Swift and Company, may have to and including April 12, 1938, within which to prepare and lodge a draft of bill of exceptions.

Dated: March 26, 1938.

A. F. ST. SURE
United States District Judge."

Now, Therefore, in furtherance of justice, the defendant herein presents the foregoing as its bill of exceptions [178] in this case on appeal from the judgment herein, and prays that the same may be settled and allowed, and signed, certified and filed as provided by law.

And plaintiff requests that there be included in this bill of exceptions such additional order or orders as may be made pertaining to the bill or pertaining to settlement or amendment thereof or pertaining to the time or term in which such bill of

exceptions may be served, signed, allowed or approved.

Dated: April 5, 1938.

MAURICE E. HARRISON
T. L. SMART
MOSES LASKY
BROBECK, PHLEGER & HARRISON
Attorneys for Defendant.

I, the undersigned United States District Judge, who presided at the trial of the above-entitled cause, do hereby certify that the foregoing bill of exceptions contains all of the material facts, matters, things, proceedings, objections, rulings, and exceptions thereto, occurring upon the trial of said cause, including all evidence adduced at the trial. And I hereby settle and allow the bill of exceptions as a full, true and correct bill of exceptions in this cause and order the same filed and made a part of the record herein. [179]

I further certify that under Rule 8 of the Rules and Practice of the United States District Court for the Northern District of California, the term of the Court within which the making and filing of the above bill of exceptions is to be done was extended to June 4, 1938; that the foregoing bill was served and lodged on April 6, 1938, within the time allowed by orders of this Court extending the time

therefor, and that it was duly presented, settled, allowed and filed within the time prescribed for that purpose and within the term.

Dated: April 28, 1938.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed Apr. 28, 1938. [180]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT.

To the Clerk of the above Court:

Sir:

Please issue for transmission to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, a certified copy of the record in the above cause, pursuant to an appeal allowed in the above entitled cause, and include in such transcript of record the following papers:

1. Complaint (filed originally in the Superior Court of the State of California, in and for the County of Sacramento, No. 53148 in the files of that Court);
2. Petition for removal;
3. Undertaking on removal;
4. Notice of filing petition and undertaking on removal;
5. Answer;

6. Verdict;
7. Judgment;
8. Petition for appeal and annexed affidavit of mailing petition for appeal;
9. Order allowing appeal and for cost and supersedeas bond;
10. Assignment of errors and annexed affidavit of mailing assignment of errors:
11. Cost and supersedeas bond on appeal and annexed affidavit of mailing cost and supersedeas bond on appeal;
12. Citation on appeal; [181]
13. Engrossed bill of exceptions;
14. Clerk's certificate to transcript of record on appeal;
15. This praecipe and annexed affidavit of mailing praecipe for transcript and order allowing appeal.

Dated: April 6, 1938.

MAURICE E. HARRISON
T. L. SMART
MOSES LASKY
BROBECK, PHLEGER & HARRISON
Attorneys for Defendant

[Endorsed]: Filed Apr. 6, 1938. [182]

AFFIDAVIT OF MAILING PRAECIPE FOR TRANSCRIPT AND ORDER ALLOWING APPEAL, ETC.

State of California,
City and County of San Francisco—ss.

George Helmer, being first duly sworn, deposes and says:

That he is a citizen of the United States and a resident of the City and County of San Francisco, State of California; that he is over the age of 18 years and not a party to the above-entitled action;

That Messrs. Brobeck, Phleger & Harrison and T. L. Smart, Esq., the attorneys for the defendant, have their offices in the City and County of San Francisco, State of California; that John M. Welsh, Esq. and Messrs. Butler, Van Dyke & Harris, the attorneys for the plaintiff, have their offices in the County of Sacramento, State of California, in the Capital National Bank Building in the City of Sacramento; that there is a daily service by United States mail at the City of Sacramento and that there is a regular communication by mail between the City and County of San Francisco and the City of Sacramento;

That on the 6th day of April, 1938, in the City and County of San Francisco, affiant deposited in the United States mail a sealed envelope, with postage thereon fully prepaid, addressed to John M. Welsh, Esq. and Messrs. Butler, Van Dyke &

Harris, Capital National Bank Building, Sacramento, California; that said envelope contained a copy of the attached Praecipe for Transcript; that on the 2nd day of April, 1938, in the City [183] and County of San Francisco, affiant deposited in the United States mail a sealed envelope, with postage thereon fully prepaid, addressed to John M. Welsh, Esq. and Messrs. Butler, Van Dyke & Harris, Capital National Bank Building, Sacramento, California; and that said envelope contained a copy of the Order Allowing Appeal and for Cost and Supersedeas Bond filed herein on April 1, 1938.

GEORGE HELMER

Subscribed and sworn to before me this 6th day of April, 1938.

[Seal] EUGENE P. JONES

Notary Public in and for the City and County of San Francisco, State of California. [184]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 184 pages, numbered from 1 to 184, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of Harry J. Gray, vs. Swift and Company, a corporation, No. 1394 Law, as the same now remain on file and of record in this

office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal, copy of which is embodied herein.

I further certify that the cost of preparing and certifying the foregoing transcript on appeal is the sum of Thirty-four and 85/100 ($34.85) Dollars, and that the same has been paid to me by the attorneys for the appellant herein.

Annexed hereto is the original citation on appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 19th day of May, A. D. 1938.

[Seal] WALTER B. MALING,
Clerk,
By F. M. LAMPERT,
Deputy Clerk. [185]

[Title of District Court and Cause.]

CITATION ON APPEAL

The President of the United States of America:

To Harry J. Gray, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, with- [186] in thirty (30) days of the date hereof, pursuant to an order allowing an appeal of the United States District Court for the Northern District of California, in an action

wherein Swift and Company, a corporation, is appellant, and you are appellee, to show cause, if any there be, why the judgment rendered against said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable A. F. St. Sure, United States District Judge for the Northern District of California, this 1st day of April, A. D. 1938.

A. F. ST. SURE
United States District Judge

Due service and receipt of a copy of the within Citation on Appeal is hereby admitted, this 5th day of April, 1938.

JOHN M. WELSH
BUTLER, VAN DYKE & HARRIS
Attorneys for Plaintiff

[Endorsed]: Filed April 6, 1938. [187]

[Endorsed]: No. 8843. United States Circuit Court of Appeals for the Ninth Circuit. Swift and Company, a Corporation, Appellant, vs. Harry J. Gray, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed, May 20, 1938.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8843

United States Circuit Court of Appeals

For the Ninth Circuit

SWIFT AND COMPANY, a Corporation,
Appellant,

vs.

HARRY J. GRAY,
Appellee.

BRIEF FOR APPELLANT

HERMAN PHLEGER,
MAURICE E. HARRISON,
T. L. SMART,
MOSES LASKY,
Attorneys for the Appellant Swift and Company.

BROBECK, PHLEGER & HARRISON,
Of Counsel

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

SUBJECT INDEX

SUBJECT INDEX TO APPENDIX

Table of Authorities Cited

*Where the abbreviation "App." appears, the subsequent numbers refer to pages of the Appendix.

STATUTES

TREATISES

No. 8843.

United States Circuit Court of Appeals

For the Ninth Circuit

SWIFT AND COMPANY, a Corporation,
Appellant,

vs.

HARRY J. GRAY,
Appellee.

BRIEF FOR APPELLANT

STATEMENT OF PLEADINGS AND FACTS SHOWING JURISDICTION.

The District Court had jurisdiction by reason of diversity of citizenship under Title 28, *United States Code,* Section 41, subdivision 1. The action was instituted by Gray, a citizen of California, against Swift and Company, a corporation and citizen of Illinois, in the Superior Court of the State of California, in and for the County of Sacramento, seeking $52,000 damages (Complaint, R. 1-4)*. Defendant duly filed its petition for removal

*The record is referred to throughout this brief by the designation "R".

(R. 5-8), its undertaking on removal (R. 8-10), notice of petition for removal (R. 10), the cause was thereupon docketed in the United States District Court for the Northern District of California, Northern Division, and issue was there joined (Answer, R. 11-17). From a final judgment (R. 18), this appeal has been taken. This Court has jurisdiction of the appeal under Title 28, *United States Code,* Section 225, subdivision (a), part first, and subdivision (d).

STATEMENT OF THE CASE.

A. THE ACTION

This is an appeal by the defendant Swift and Company from a judgment against it in an action for slander. Defendant is a corporation, hereafter referred to as Swift; the plaintiff Gray was one of Swift's employees at the time of the alleged utterances; and the action is predicated upon remarks supposedly uttered to customers of Swift by two friends of Gray, both employees of Swift, but neither an officer of the corporation, Eugene Harbinson and Charles P. Gould.

The complaint alleges that defendant spoke of plaintiff (R. 2):

> "Harry is short in his accounts with the company. He has been taking the company's money. He has collected money of the company and has not turned it in."

The complaint charges by way of innuendo that the supposed utterances meant and were understood to mean that plaintiff had been guilty of embezzling funds entrusted to him as an employee of the defendant (R. 2, 3).

The answer denies that defendant had made any such utterances (R. 12). By an affirmative defense it alleged that the words, if spoken, were true, while at the same time denying

that they meant or could be understood to mean that plaintiff had been guilty of embezzlement (R. 13-14).

By a further affirmative defense (R. 14-15) it was alleged that if the words were spoken at all, they were uttered without malice on a privileged occasion.

B. APPELLANT'S GROUNDS FOR REVERSAL.

A jury having rendered its verdict for the plaintiff, the grounds to which appellant now confines itself in seeking a reversal may be classified in four groups.

1. The words were spoken on a privileged occasion.

This contention was raised by motion for non-suit, by motion for a directed verdict, by motion for judgment notwithstanding the verdict, by requests for instructions which were refused, and by objections to instructions which were given. The trial court not only refused to hold that the utterances were made on a privileged occasion, but it refused to submit the issue of privilege as well as the allied issue of malice to the jury, and it held as a matter of law that there was no privilege.

This is now the ground principally assigned by appellant for reversal.

2. The employees who uttered the words were not acting in the course or scope of their employment, and the corporation is not responsible for anything they may have said.

This point was raised by motion for a directed verdict, by motion for judgment notwithstanding the verdict, by objections to evidence, and by requests for instructions which were refused.

It is now appellant's second principal ground.

3. The words proven to have been uttered by Harbinson and those supposedly uttered by Gould are not as a matter of law defamatory, and they are likewise true.

This contention was raised by requests for instructions which were refused.

4. Evidence was erroneously admitted concerning efforts of the plaintiff to find employment.

This point was raised by objections to the evidence. Because of lack of space, we place our discussion of it in the Appendix, pages 15 to 24.

C. STATEMENT OF THE FACTS.

Harry J. Gray, the plaintiff, became an employee of Swift in January, 1933, serving in various manual labor jobs in its South San Francisco plant until October, 1933 (R. 74). He then became a sausage service truck driver for Swift on a route from South San Francisco to Palo Alto and continued as such until October 29, 1934 (R. 75). His duties as truck driver were to call on the trade and sell produce right from the truck. Swift had a checking system whereby it kept track of every pound of goods placed on the truck each morning, and everything had to be accounted for (R. 75, 111). The truck driver was given a pad of sales slips known as a sales invoice book. These slips were numbered and the company kept a record of all slips given to a driver. When a sale was made by the driver, the slip was filled out in triplicate, showing the customer's name, address, the materials sold and the amount of the purchase. If the sale was for cash paid to the driver, he marked the slip as paid. The original was given to the customer, and two copies were to be turned into the company. In the case of charge sales, the slips were to be turned in by the driver to the department having supervision of charge accounts. Cash sale slips were to be turned in together with the cash collected to the cashier's

department, together with a tabulation in a cash collection book. The latter was a pad of slips supplied to the driver; at the end of each day the driver was to fill out one slip in triplicate for each town served, showing the customer's name, dates, articles bought and amounts collected.

With respect to cash sales there was thus to be turned in by the driver to the cashier's department three things: (a) the cash; (b) two copies of the sales slips; (c) the cash collection book (R. 75). When these things reached the cashier two copies of the collection sheets were removed from the book, a receipt was marked on the third copy which was left in the book, and the book was returned to the driver. This constituted the driver's receipt for money collected and turned in (R. 75, 128).

By means of a check list entitled "Daily Sales Ticket Report" and commonly called a "checkerboard", the auditor's department was enabled to follow every sales slip outstanding, checking it off on the checkerboard as it was turned in by the driver, in this manner keeping track of accounts with the driver and with the customers (R. 110, 162). As stated by the plaintiff Gray, "The sales tags were checked out to me and in effect charged to me and then credited to me when they came back." (R. 111). "I had to account for each ticket." (R. 131).

A driver was discharged of responsibility only when he had turned in the collected moneys and slips to the person designated to receive them (R. 166).

It is conceded to have been the company's rule, which Gray admitted he knew, that the drivers were to turn in their cash, sales slips, and collection books at the end of each day's work,—to the cashier, if there; if the cashier had left for the day, then to a night order clerk; and if he had left, then to the night watchman (R. 124, 158-161). For several months Gray obeyed the rule, but during the last seven months of his employment he chose to ignore it. He then kept each day's collections overnight in his own room and next morning placed the money,

sales tags and book in an envelope and tossed it into the cashier's cage in the company's office (R. 76, 124) before anyone else had arrived for the day's work. Later in the day the cashier would find the bundle on the floor, and perhaps two or three days later Gray would pick up his receipted collection book. There is conflict in the evidence as to why he deviated from the rule. The explanation given by him in October, 1934, was that he would arrive late in the evening and felt too tired to complete his reports (e.g., R. 164). His version during the trial was that he would get back to the plant each night after the cashier had gone, that the night order clerk would not give him a receipt and that he therefore preferred to retain his collections until the next morning (R. 76). This explanation is at least puzzling, because when he did in fact turn in the money in the mornings, he would throw it in the cashier's cage with no one around and would not obtain his receipt until a subsequent day (R. 125, 128).

In this setting there occurred the happenings of October, 1934, with which this case is concerned.

On Saturday, October 13, 1934, Gray was about to go on a two weeks' vacation which had already been arranged (R. 76). For the past few days he had been accompanied on his route by Eugene Harbinson, his roommate, who had been assigned to be his relief man during his vacation and in this manner was becoming familiar with the work (R. 77, 85). Gray claims that on Saturday morning about 7:15 A. M., with nobody else around (R. 122), he threw into the cashier's cage a bundle containing about $60 together with the sales slips and collection book covering the previous day's collections (R. 76).

None of this money or the slips or book has ever been found (R. 111).

At about 1:30 P. M. on that Saturday, he and Harbinson returned to the plant at the close of the day's work to turn in Saturday's collection. As they were leaving, the cashier Hamilton stopped Gray and asked him where Friday's collections were, stating they had not been received (R. 78). This was all the cashier said (R. 86). Gray and Harbinson thereupon searched the office for the supposed envelope (R. 78, 86). They then returned to their room in the hotel where they were joined by Charles Philip Gould, another employee of the company and former roommate of Gray (R. 86, 148), and the three of them ransacked the hotel room. They then returned to the office and searched again, still without success.

Gray nevertheless desired to proceed upon his vacation, and this he did, that very day, returning on October 28, 1934 (R. 80). Before leaving on his vacation and while still in the plant that Saturday afternoon, the following occurred:

According to the testimony of the plaintiff and of Harbinson, who was his witness, the Assistant Sales Manager Mr. Everett happened to be present in the plant, and Gray told Mr. Everett that he knew approximately how much money had been collected and *volunteered that he would make out a list of this amount,* setting forth the names of the customers and the amount supposedly collected, and that he would leave it with Mr. Everett; that he, Gray had enough money coming to him to cover the *"shortage";* that he had been planning on his vacation and wanted to go although the shortage had not been cleared up (R. 79).

Gray then prepared a list setting forth the customers' names and the amounts collected on Friday, and this, he testified, he gave to Mr. Everett (R. 80). The list is in evidence as Defendant's Exhibit C (R. 122). In Gray's own words:

> "That Saturday afternoon, October 13, after ransacking the baskets and finding no trace of any tickets or anything, Mr. Everett said, 'Mr. Gray, what do you propose to do about this?' I said 'Irving, it looks like a case where the

> money is gone. There is nothing that I can possibly do. I will give you a list of all people that I collected from yesterday. I can give you the approximate amount of the money that I collected from each one. Mr. Harbinson was with me, and he will remember, and that will be a double check. *I will give you this list, and let you check it, and find out how much it is.* I have a check coming for a week's salary and the week you have given me for a vacation. That is enough to cover this amount,' which I thought was around $60.00. *'I realize the money is gone; that I haven't a receipt to show you for it; but naturally I have to make it good,* and as long as I have that much money here you don't have to worry about me, and I am not running away; in fact, I am coming back, and I would like to get to the bottom of it.' " (R. 123, 124)

He also said:

> "I just *volunteered* to give the list to Everett." (R. 124)
>
> *"I drew up that list with the intention that someone should check the route."* (R. 123)

Thus Gray volunteered to draw up this list and did it with the intention and for the purpose that someone should check the route to determine the facts and the amount and nature of the shortage.

The plaintiff's friend and witness, Harbinson, described the occurrence thus:

> "At that discussion *Mr. Gray* asked Mr. Everett if he could go on his vacation, *saying there was enough money coming to him to take care of the shortage* and that he would make up the *shortage. That was Mr. Gray's expression at the time.* At that meeting in the office there, Mr. Gray wrote out that list in his own handwriting. *He told Mr. Everett that he could take this list he had prepared in order to check with the amount that was short.* In other words, he told Mr. Everett that he was willing to make up *the shortage* and that he had prepared this list of customers

he had called on so that a check could be made on the amount of the shortage." (R. 95)

The expression "shortage" was thus, according to plaintiff's own witness, the plaintiff's own expression and was first used by plaintiff himself. Plaintiff realized automatically that whatever may have been the reason for the disappearance of the money, the facts that it had not been received by the proper authorities and that he, Gray, had no receipt to show that it had been delivered, sufficed to constitute a shortage (R. 87).

Harbinson testified that on the following Monday, October 15th, Mr. Everett gave the list to him, and told him to check the route (R. 87).

It is well to note at this point that Mr. Everett testified that he never saw or heard of this list, that it was not given to him by Gray, that he had no conversation with Gray on the subject, that he had never requested Harbinson to check the route and never had anything to do with the matter (R. 141, 142). Also, Mr. Gould, who was present that Saturday afternoon, testified that Mr. Gray drew up the list and gave it directly to Mr. Harbinson, asking Mr. Harbinson to take it and check the route for Gray, so that on the latter's return from his vacation he could reimburse the company (R. 149).

There is in the record evidence that at a time previous to the trial Mr. Harbinson had himself admitted the facts as so testified by Mr. Gould (Def. Ex. A, R. 136; Testimony of Hogan, R. 135; of Gould, R. 152), and this is confirmed by the fact that Mr. Gould on the following Monday made an independent check of the route at the request of Mr. Hartl, the plant auditor, as we shall point out. But in view of the jury's verdict we may now accept the plaintiff's version and we shall proceed further on that basis.

On Monday morning, October 15, 1934, Mr. Harbinson began to check the route as he made his round of calls selling sausages for the company. As he called on customers named in

Gray's list (Def. Ex. C), he asked each one for permission to see the sales tickets which Gray had given on Friday, for the purpose of finding out how much money had been collected, i.e., to ascertain the state of the accounts with the customers.

On no occasion did Mr. Harbinson volunteer information why he wanted to see the tags. Some customers objected to showing the tags unless they knew why they were wanted; it appeared that Gray had been selling the products at cut rates and the customers felt that this was an attempt to check up on that circumstance. Solely in response to inquiries of customers why the slips were desired, Harbinson told several of them that Gray was short in his accounts. These statements form the basis of the present slander suit.

Mr. Harbinson's testimony was:

> "*I never volunteered anything about the reason why I was there asking unless they objected or asked why I was requiring the sales tag. It was only in response to their questions as to why I wanted the sales tag that I referred to the shortage.* I don't believe anyone on whom I called gave me sales tags without raising any objection about why I wanted it.
>
> "I have mentioned all the people to whom I spoke on Monday as far as I can remember. *When they asked me why I wanted the sales tag, I told them that Mr. Gray had this shortage in the accounts.*" (R. 96).

Harbinson described conversations which he had with eight customers. In order to enable the case to be clearly presented hereafter and to do so frankly, we set out the conversations fully.

At the Los Angeles Market at Burlingame the following conversation occurred:

> "I went in and asked this woman if I could see the sales tags which Gray had given her on Friday. *After some discussion as to why she wouldn't let me see it,* I told her that Mr. Gray was short in his accounts with the company; that I wanted to find out how much she had paid Mr. Gray on

Friday. There was no further conversation with her other than arguing with her over the fact that she thought I was trying to compare prices. There was no further conversation with respect to what I told her I was there for. She gave me the tag." (R. 88)

At Al & Monte's Market in San Mateo the following conversation occurred:

"I went in and asked him if I could see the sales tag that Mr. Gray had given him on Friday. He said that he did not have it with him, *and he wanted to know why,* and I said I was out checking Mr. Gray's route, that he had been short in his accounts with the company and that I wanted to find out the amount he had paid." (R. 89)

At Larry's Groceteria near San Mateo the following is said to have occurred:

"I said that I wanted to see the sales tag Mr. Gray had given him on Friday. *There was some discussion as to why I wanted to see it,* and I told him that Mr. Gray was short in his accounts and I wanted to find out how much Larry, the owner of the store, had paid Mr. Gray, as he did not turn in his money." (R. 90)

At the Economy Market at Menlo Park:

"I wanted to see his sales tag that Mr. Gray had given him on Friday, *and we had some discussion as to why I wanted to see it,* and he said I merely wanted to compare prices that Mr. Gray had quoted him on Friday. I said, 'No,' that I was checking Mr. Gray's route, that he was short in his accounts and he had not turned any money in." (R. 90)

At an unnamed market at Mayfield to one called "Joe":

"I asked him if I could see the sales tag for Friday that Mr. Gray had given him and that Mr. Gray was short in his accounts with the company. I wanted to find out how much money he had paid Mr. Gray." (R. 91)

At Mrs. Lightner's Market in Mayfield:

> "I asked her if I might look at the sales tag that Mr. Gray gave her on Friday to find out how much she had paid him as he had not turned in the money to Swift and Company." (R. 91)

At Arjos' Market in Mayfield:

> "I asked Arjo if I might look at the sales tag Mr. Gray had given him on Friday and he said, 'Why yes,' *and he came back and wanted to know why I wanted to look at it,* and he said there was some trouble between Mr. Gray and the full line salesman, that they were always fighting for the business, and he wanted to know if I wanted to compare prices, and I said, 'No.' I said Gray was short in his accounts and had not turned the money into Swift and Company and I wanted to find out the amount." (R. 92)

At an unnamed market in Mayfield:

> "I told him I wanted to see the sales tag Mr. Gray had given him on Friday, *and he objected to that. So I told him that* Mr. Gray was short in his accounts with the company and I wanted to find out how much he paid Mr. Gray as the money was not turned into the company." (R. 93)

The foregoing constitute *all* of the conversations with respect to which Harbinson testified he made remarks of the type complained of. It will be seen that to *three* customers Mr. Harbinson testified that he merely said that Gray was short in his accounts. With respect to the others, Mr. Harbinson added the statement "and (or 'as') he had not turned the money in."

Of these eight customers three were themselves called as witnesses. One of them, Larry Lewin, of Larry's Groceteria, testified that the person who had checked with him and asked for the sales slip was not Harbinson at all, but was Gould, and he further testified that nothing at all was said about Gray, who was not even mentioned; that he, Larry, was merely asked for the sales slip and that he gave it. In other words, he denied

Harbinson's testimony point blank and confirmed Gould (R. 134 and see page 17, below).

Emmett Arjo testified for the plaintiff as follows:

> "Mr. Harbinson asked to see my sales tags. *I asked the reason for it,* and he said Mr. Gray had been accused of taking money from Swift and he was checking up to see how much I paid him." (R. 101)
>
> "All that was ever said by Harbinson was that Mr. Gray was short in his accounts and that he had been accused of taking the money. I feel very friendly to Mr. Gray." (R. 102)

A comparison of the testimony of Harbinson (testifying for plaintiff) with the testimony of Arjo concerning this same conversation, shows that Arjo has embellished the conversation with some imagination.

Mr. Montemagni, of Al & Monte's Market, one of the men to whom Mr. Harbinson testified he had spoken, also testified for plaintiff and his testimony is extremely significant. He said:

> "About the time Mr. Gray went on his vacation, Mr. Harbinson took the route and came along and asked me if I could produce some sales tags for the previous week. He told me Mr. Gray was short in his accounts, that is, in collections, and he would like to check on it." (R. 107)

He then went on to say:

> *"Mr. Harbinson did not say anything to me to the effect that Mr. Gray had ben crooked or guilty of embezzlement or anything to that effect. All he said was that he was checking up because Gray was short in his accounts. And he said that in answer to my question as to why he wanted those tags. As I recall he did not volunteer that remark until I naturally asked him why he wanted them."* (R. 107-108)

Montemagni stated that Gray himself had come to him and that it was Gray who had said that he had been accused of taking the company's money. Mr. Montemagni was very positive

that no one but Gray had told him that Gray had been accused of taking money (R. 108-109).

On redirect examination, Mr. Montemagni was asked by plaintiff's counsel to reconcile his testimony that he had been told that Gray was short, with his testimony that no one had ever told him that Gray had been crooked or guilty of embezzlement or had taken any money. He answered that *both of the statements were true.* He reiterated that:

> "No person from Swift and Company ever accused Gray of taking the money or any money; nobody has ever told me that. All they ever asked was for the sales tags for the simple reason that Mr. Gray was short, and that was in answer to my inquiry as to why they wanted the sales tags." (R. 109, 110)

In other words, Montemagni did not understand Mr. Harbinson's statement that Gray was short as being a statement that Gray had taken the money or was guilty of embezzlement. He understood it as a mere matter of checking the records and nothing more.

Such was also Mr. Harbinson's view of the situation. He did not consider that his remarks that Gray was short or had failed to turn in the money to be statements that Gray had taken or embezzled the money or been dishonest. He testified:

> *"I never told anybody he was dishonest.*
>
> *"I never said to anybody anything in substance or effect that he was dishonest or crooked at any time prior to October 16, 1934 or at any other time.*
>
> *"In other words, I never said to anyone in substance that Harry Gray had embezzled money."* (R. 95, 96)

By his occasional statement that Gray had not turned in the money, he did not suppose that he was saying anything different than that the accounts were short; he testified, for example, on cross examination:

"I cannot remember any other statements which I made to them on that subject other than the mere statement that this shortage existed." (R. 96)

It is here to be noted that Mr. Harbinson, Gray's roommate and close friend (R. 94), was very much interested in Gray and desired to help him out (R. 95).

On Tuesday afternoon, October 16, 1934, Mr. Harbinson met Gould on the territory and learned that Gould had been sent out by the Auditor of the company to check the route; and he, Harbinson, thereupon discontinued his own investigation (R. 93, 94, 96).

We now come to Charles P. Gould. Plaintiff's case is based chiefly on Harbinson's utterances, but also in part on remarks supposedly made by Gould. But while Mr. Harbinson testified for plaintiff, Mr. Gould testified for the defendant. Gould had been a roommate of Gray and was very friendly to him (R. 148). He had helped search for the money on Saturday afternoon and believed in Gray (R. 148). He felt also that by his investigation he might be able to clear up the matter in a way satisfactory to Gray (R. 157).

On Monday, October 15, 1934 the cashier reported to Mr. Hartl that he had not received Gray's Friday collections (R. 162). Mr. Hartl was the Auditor and Office Manager. His duties as such were to take charge of the accounting, to audit all accounts throughout the plant. That duty "includes any question of discrepancy of accounts with the salesmen." (R. 162). When a discrepancy occurred or arose with reference to collection of accounts, it fell within the department of Mr. Hartl to investigate. It was not within the jurisdiction of the Sales Department, the Sales Manager, or the Assistant Sales Manager; they had no duties in the matter of discrepancies (R. 168). *Such is the uncontradicted evidence.* It was so testified to by Mr. Hartl (R. 162), by Mr. White, General Manager of the company (R. 168), and by Mr. Everett, Assistant Sales Manager. The latter

testified that the sales department had nothing to do with discrepancies in the accounts, nor had anything to do with checking the accounts, that those matters fell to the plant auditor (R. 140), and also:

> "There are definite instructions in Swift and Company to their sales department, that when discrepancies or shortages, or anything of that nature, occur on the route, the sales department has positively nothing to do with it, that man automatically comes under the jurisdiction of the plant auditor and the only part we play is replacing the man on the route." (R. 146)
>
> "In case a discrepancy occurs of this character, the matter of checking up on the discrepancy falls within the jurisdiction of the auditor's department and not that of the sales manager's department." (R. 147)

This question of jurisdiction with respect to checking accounts is important in connection with the question of whether Mr. Harbinson was acting within the course or scope of his employment at the time he made the remarks concerning which he testified.

When the cashier reported to Mr. Hartl on Monday morning, the latter immediately had the sales ticket numbers checked on the "checkerboard" (p. 5, supra), to ascertain what tickets were missing and unaccounted for (R. 162, 163). It was thereby discovered that not only Gray's tickets for Friday were missing but tickets were missing from the previous weeks. Mr. Hartl thereupon received permission from Gould's superior to send Gould out to check the route. Mr. Gould came to Mr. Hartl and was given a list of the unaccounted for ticket numbers and told to go to the customers and ask to see copies of all sales tags in an endeavor to find the missing ones and see what they represented (R. 149, 163). The instructions to Gould were "merely to go into the customer's store and ask if he might be permitted to look at the tickets." (R. 163). Mr. Gould did not have either the names of the customers or the amount of the purchases and he did not have Gray's list.

Mr. Hartl never talked to Mr. Harbinson and gave him no instructions or requests on the subject (R. 163).

Mr. Gould started out on the route to check on Monday afternoon and completed his task on Wednesday or Thursday (R. 150).

He testified that:

> "I did not state to any of the customers that Harry Gray had failed to turn in money or that he had stolen money or any words to that effect or that he was short in his accounts. I did not say that he was short." (R. 151)

When he went into a store he told the proprietor or manager that he wished to see their invoices. If the customer did not ask why, nothing more was said. Many customers asked why, and in response Mr. Gould replied that there were missing ticket numbers, that he had been asked to try to obtain copies of the missing tickets as the company wanted to straighten out the accounts (R. 150, 151, 154).

According to Gould's testimony, nothing whatever was said by him which either referred to or disparaged Gray. On the other hand plaintiff produced three witnesses who testified to remarks supposedly made by Gould. Mrs. Polly Guptill, a restaurant owner in Burlingame, testified:

> "Mr. Gould asked to look over the receipts. *I asked him why.* He answered that the reason was that he was sent out by Swift because Harry was short in his accounts, and he wanted to check up on his cash sales slips. I let him see them. I wouldn't say how many days or what slips he was looking for. He looked at plenty; for several months." (R. 105)

Mrs. Dorothy Hamilton Kipps was a waitress in Guptill's restaurant. She testified that she had heard the conversation between Mr. Gould and Mrs. Guptill. She said:

> "Mr. Gould came in and asked to look over the accounts saying that there was a shortage and he wanted to see what Mr. Gray's accounts were with Swift." (R. 106)

It is to be noted from the testimony of Mrs. Guptill and Mrs. Kipps that *whatever Gould is supposed to have said at Guptill's was in response to an inquiry as to why he wanted to see the sales tickets, and that what he said was merely that there was a shortage in accounts and that the company wanted to check up.*

Mr. Gould denied that he ever made the remark to Mrs. Guptill or Mrs. Kipps. (R. 151, 155).

One Fred Langbehn testified for plaintiff that Mr. Gould called on him to "check over the bills of things we had bought from Swift and Company" and "asked if he could see the bills;" that

> "He said the reason he would like to see the bills was it seemed Harry Gray had taken some of Swift's money just before he went on his vacation and they wanted to see just how much he had taken." (R. 103)

Mr. Langbehn testified that *these statements probably were not voluntered by Mr. Gould, but were probably given in response to inquiries why the bills were wanted.* He said:

> "I don't remember whether I asked Gould why he wanted to see the bills or whether he just told me. I might have asked him first. Mr. Gould did not express any ill will personally on his part toward Mr. Gray. * * * I don't remember word for word what was said." (R. 104)

Mr. Gould denied making any such statements to Mr. Langbehn (R. 152, 154).*

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*We think it certain that Mr. Langbehn and Mrs. Guptill, having been told that there were missing tickets, permitted imagination to fill in the rest during the time elapsing before the trial in 1938, or confused what Mr. Gould had told them with remarks that had been made to them by Mr. Harbinson or by Mr. Gray himself. It is evident from the testimony of plaintiff's witness Montemagni that Gray had made a tour of the route and himself spread the rumor among customers that he had been discharged for taking funds.

The investigations made under Mr. Hartl's instructions showed unaccounted for shortages of about $150.00 (R. 125), and when Mr. Gray returned from his vacation he gave his check to the company for the difference between the wages due him and the unaccounted for amounts (R. 113, 126, 130).

Gray returned from his vacation on October 29, 1934, a Sunday. He reported to Mr. Hartl the next morning and thereafter had a conversation with Mr. Hartl and Mr. White, the General Manager. He was relieved as salesman and was offered a job in the plant by Mr. White, but he did not care to take it, and his employment with the company thus ceased (R. 169).

It is admitted by Gray that the officers of the company did not accuse him of stealing any money. Gray testified:

> "*Mr. Hartl never said to me that I had stolen any money;* what he said was that I was suspended from the company; that he had wired to Chicago and that I was suspended, and *that I was short,* and my accounts came to some $150, and it was up to me to make it up. *He did not say I had stolen any money; he said my accounts did not balance, that I was short.*" (R. 125, 126)

Mr. Hartl testified without contradiction that what he told Gray was:

> "That it wasn't a question of anything except that this money had not been turned in to us, we had not received it, and therefore any moneys collected by anyone in the employ of Swift and Company belonged to Swift and Company and they were not relieved of responsibility until they had turned it in. * * * I told him that we didn't accuse him of anything except carelessness, and he admitted he was careless." (R. 163, 164)

> "I never accused Mr. Gray of anything except carelessness. I never accused him of taking any money and converting it or embezzling it or stealing it. The discussion I had with Mr. Gray was lengthy but all repetition. The repetition was that he was concerned and repeatedly said

> he wanted me to answer him as to whether I thought he took the money or not. My reply was that it wasn't a question of whether he took it or not, the question was we had not received it." (R. 164, 165)

(See also testimony of Mr. White (R. 169) and defendant's Exhibit G, a letter from Mr. White to Mr. Gray (R. 126).)

After leaving the service of the company Gray made efforts to obtain employment. He testified concerning his efforts and lack of success, but offered no evidence that any supposedly slanderous utterances had ever been made to any of the people of whom he sought employment or brought to their attention. There is no evidence to show the connection between the supposed slander and his failure to obtain employment (Appendix, p. 15). He later went to Los Angeles and obtained employment there.

In the Spring of 1935 there was an interchange of correspondence between Gray and Swift, initiated by Gray (Def. Ex. H and G, R. 127) in which they showed entire friendliness toward each other and no animosity whatsoever. At no time did Gray ever inform anybody at the company that he had been slandered (R. 125), although he claims that he had learned of the supposed utterances when he himself went over the route upon return from his vacation, in October, 1934. The present suit was commenced on October 11, 1935, a few days before it would have been barred by the statute of limitations. No previous suggestion had ever been made by plaintiff that he had considered himself wronged by any supposed slander.

SPECIFICATION OF THE ASSIGNED ERRORS TO BE RELIED ON.

Appellant assigned fifty-seven errors and in this brief relies on forty-seven. These errors may be grouped according to their general subject matter in the four groups noted on pages 3

and 4, supra. The Roman numerals refer to the assignments and the Arabic to the page of the record where the assignments appear.

a. Relative to the matter of privilege:—

I (24), II (24), III (25), IV (26), VI (27), VII (28), VIII (30), IX (31), XI (32), XII (32), XIII (33), XIV (34), XV (35), XVI (36), XVII (36), XVIII (37), XIX (38).

b. Relative to the authority of the employees to make the remarks:—

II (24), III (25), IV (26), XX (39), XXI (39), XXII (40), XXII-A (41), XXIII (41), XXVII (45), XXVIII (46), XXIX (46), XXX (47), XXXI (48), XXXII (49), XXXIII (49), XXXIV (50), XXXV (51), XXXVI (52), XXXVII (52), XXXVIII (53), XXXIX (54), XL (55), XLI (55), XLII (56).

c. Relative to the non-defamatory character of the words:—

IV (26), XXIV (42), XXV, (43).

d. Relative to efforts to obtain employment:—

XXVI (44), XLVI (59), XLVII (60), XLVIII (61), XLIX (61), L (62), LI (63), LII (63).

ARGUMENT

I.

THE UTTERANCES COMPLAINED OF WERE MADE ON A PRIVILEGED OCCASION AND WITHOUT MALICE.

A. Assignments of Error Involved

I. (R. 24)

"The Court erred in denying the motion made by the defendant at the close of plaintiff's case for a nonsuit. The motion so made was as follows: 'The defendant in this case moves for a judgment of nonsuit, or dismissal, on the following grounds: First, that it appears affirmatively from the evidence that the utterances complained of are privileged in character, and that under the provisions of Section 47 of the Civil Code of California and under the Common Law, no cause of action arises therefrom; inasmuch as it appears by uncontradicted testimony that the only communications here made were communications without malice to a person interested therein by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent; or, three, who is requested by the person interested to give the information.'

"The said motion was thereupon denied by the Court, to which ruling counsel for defendant then and there excepted."

II. (R. 24, 25)

"The Court erred in denying a motion made by the defendant at the close of all evidence for a directed verdict in favor of the defendant. The said motion was made as follows: 'I move, if the Court please, that the jury be directed to return a verdict for the defendant on the ground that it appears by uncontradicted testimony that the statements here complained of are privileged in character and that it appears without contradiction that there was no actual malice, and particularly on the ground that it appears that the statements complained of were made by

one who is interested in the communication to another person interested in the communication and were made by a person interested and who was requested by the person interested to give the information.

" 'I assign as an additional ground for a directed verdict for the defendant in this case that the uncontradicted evidence shows that the communication here involved is a privileged communication having been made by a person interested therein to another interested therein, and on the further ground that it was made in response to an inquiry, and on the ground that the uncontradicted evidence shows absence of express malice. * * *'

* * * * * * *

"The Court denied said motion for a directed verdict, to which ruling defendant by its counsel then and there excepted."

III. (R. 25, 26)

"The Court erred in denying the defendant's motion for judgment notwithstanding the verdict, said motion being made before judgment had been entered upon the verdict. The motion was as follows: 'I move for judgment in favor of the defendant, notwithstanding the verdict, on the grounds stated in support of my motion for a directed verdict, to wit, that the uncontradicted evidence in this case shows that any communications made were those of a privileged nature, by a person interested therein to another person interested therein, without malice * * *'

"The Court denied said motion for judgment notwithstanding the verdict, to which ruling the defendant then and there excepted."

IV. (R. 26)

"The Court erred in entering judgment in favor of the plaintiff and against the defendant upon the verdict."

Other assignments of error, having to do with instructions improperly refused and instructions improperly given, all with respect to privilege, are set out at the beginning of appropriate subdivisions of the argument, pages 43-51, infra.

B. Summary of Argument

The occasion for the utterances of Gould and Harbinson was the checking of the accounts of Swift with its customers and was therefore privileged. The utterances were made in response to inquiries of the customers, without malice toward Gray and without belief that Gray was being disparaged. Moreover, actual malice, if any, of an employee is not imputable to a corporation. The facts being undisputed, it was for the court to declare that the occasion was privileged. For these reasons the court should have nonsuited the plaintiff, directed a verdict against him, or entered judgment for the defendant notwithstanding the verdict. On the contrary the court held as a matter of law that the occasion was not privileged, declined to instruct the jury on the subject of actual malice, and instructed it that malice was to be presumed from the mere fact of the utterances.

C. Discussion

1. Statement of the general principles of qualified privilege.

California Civil Code, Section 46, defines slander as a publication which is not only false but which is unprivileged. *California Civil Code, Section* 47, defines a privileged publication as follows:

> "A privileged publication is one made * * *
>
> 3. In a communication without malice, to a person interested therein (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information."

These subdivisions of Section 47 "completely eliminate from the law of libel a communication without malice" of the types

there described. *Heuer v. Kee,* 15 Cal. App.(2d) 710, at 714, 59 Pac.(2d) 1063.

A communication on a privileged occasion made without malice is not slanderous even though false in fact. Truth is not an ingredient of the defense. *Jones v. Express Publishing Co.,* 87 Cal. App. 246, 262 Pac. 78. Judge Leon R. Yankwich in his *"Essays on the Law of Libel",* p. 151, pungently puts it thus: "A lie is privileged if told on a privileged occasion, without malice."

The whole question with respect to privilege is this: Is the occasion a privileged one? The privilege appertains to the occasion. If the occasion was one where it was appropriate for the one party to speak to the other upon the general subject matter, a remark made in the course thereof without actual malice is not actionable, though untrue. The doctrine of privilege is the product of the realization that the affairs of life must go on, and that while people ought not to speak ill of others, there are certain occasions where the convenience and the interests of society require that people be permitted to speak without the peril of legal punishment if they prove to be in error.

As stated in *Jones v. Express Publishing Co.*, supra, at 255:

> "The doctrine of privileged communications rests essentially upon public policy. Under proper circumstances the interest and necessities of society become paramount to the welfare or reputation of a private individual, and the occasion and circumstances may for the public good absolve one from punishment for such communications even though they be false. (Newell on Libel, 340, sec. 341)."

Proper protection against abuse is provided in the case of qualified privilege by the requirement that there be no malice.

The malice referred to is actual malice.

Civil Code, Section 48, itself provides:

> "In the cases provided for in subdivisions 3, 4 and 5 of the preceding section, malice is not inferred from the communication or publication."

If a remark is made in good faith and without any desire or disposition to injure the party of whom it is spoken and without any spite or ill will toward him, then it is not malicious. In other words the malice required to defeat privilege

> "is malice in the popular conception of the term; that is to say as a desire or disposition to injure another founded on spite or ill will."
>
> *Siemon v. Finkle,* 190 Cal. 611, 213 Pac. 954;
> *Davis v. Hearst,* 160 Cal. 143, 116 Pac. 530.

This matter of malice is more fully discussed at pages 36 to 42, below.

Massee v. Williams, 207 Fed. 222, (C. C. A. 6th), at 230, defines a privileged communication thus:

> "A privileged communication comprehends all bona fide statements in the performance of any duty, whether legal, moral, or social, even though of imperfect obligation, when made with a fair and reasonable purpose of protecting the interest of the person making them or the interest of the person to whom they are made. [Citations omitted.] A conditionally privileged communication is a publication made on an occasion which furnishes a prima facie legal excuse for the making of it and which is privileged unless some additional fact is shown which so alters the character of the occasion as to prevent its furnishing a legal excuse."

36 *Corpus Juris* 1262 defines privilege thus:

> "Generally, any communication published by one in good faith to another, in order to protect his own interest or to protect the corresponding interest of another in a matter in which both are concerned, is privileged, when the subject matter of the publication makes it reasonably necessary under the circumstances to accomplish the purpose desired."

The occasions of privilege are as numerous and varied as the affairs of man. In 26 *California Law Review,* 226, at 228, it is said, referring to *California Civil Code,* Sec. 47, subd. 3:

> "The breadth of this definition forbids any attempt to confine the privilege referred to within narrow limits, and by the same token lessens the fear that a rule grounded upon public policy will in its future application be so narrowly interpreted as to defeat that policy."

Before reviewing cases of close analogy, the pertinent facts may summarily be restated.

2. The facts and circumstances of the occasion and the utterances here involved.

The facts are fully stated and documented to the record at pages 4 to 18, supra. They are here summarily restated. The occasion on which the remarks upon which this suit is predicated were made was the checking of the accounts between Swift and its customers, who had been served by Harry Gray on Friday, October 12, 1934. On Saturday, October 13, 1934, it had been found that the accounts were short. Whatever the cause of the shortage, whether dishonesty of some individual named or unnamed, or unfortunate misplacement, a shortage did in fact exist;—in other words, money was missing. Moneys had been paid by the customers to be transmitted to Swift for goods purchased by them, and those moneys had not come into the company's records. It was, as a matter of business sense, important for Swift to ascertain the facts, and it was equally desirable for the customers that Swift's records properly reflect payments made.

In order that the facts might be ascertained, so that whatever was thereafter to be done might be done intelligently and fairly—fairly to Swift, fairly to Gray, and fairly to the customers,—one course alone was open. Inquiry had to be made, and it had to be made of the customers. In short, the route had to be checked. This was so much the obvious thing to do that the plaintiff Gray at once realized it. The word "shortage" was first used by him, and the suggestion that the route be checked was first voiced by him. (See statement of facts, pp. 8, 9, supra.)

Gray *volunteered* to make out a list of the customers and the approximate amounts collected from them, *and he did so for the purpose and with the intention that the route be checked and the shortage ascertained,* stating that he had enough money coming to him from the company to cover any shortage found to exist. Indeed, he asked that the check be made by others instead of doing it himself, in order that he might be permitted to go upon his vacation as planned. *Volenti non fit injuria* (See statement of facts, pp. 7-9, supra.)

Harbinson and Gould independently checked the route. What Harbinson did was to ask the customers what money they had paid Gray on Friday. What Gould did, during the course of his check, was to ask the customers for permission to see past sales tags. *Nothing was ever said by either one to any customer concerning Gray until after the customer asked why Harbinson wanted to know what moneys had been paid or why Gould wished to see the sales tags, or objected to replying or showing the requested tags until informed of the reason for the inquiry.* It was then, and *only in response to the inquiries of the customers and only to explain the reason for the check,* that any of the utterances complained of are supposed to have been made.

It is self-evident, too, that whatever Harbinson or Gould uttered was said without any malice or design to injure Gray. They did not speak to the customers in the presence of anyone else, but waited until anyone else present had gone (R. 101). It is to be recalled that Harbinson and Gould were both friends of Gray, roommates or former roommates, and that Harbinson was Gray's principal witness. He was very much interested in him and desired to help him out at the time of the check (R. 95). Harbinson did not even suppose that he was disparaging Gray. He testified that he never told anybody anything in substance or effect that Gray was dishonest or crooked or that he had embezzled money (page 14, supra).

It is clear that Harbinson, in making the utterances that he did, was stating only what he supposed to be an objective fact,

namely that money collected had not cleared through the department of Swift designated for that purpose. Harbinson did not suppose that he was giving an explanation for the existence of this objective fact, or placing any blame, and in using the term "shortage" to describe the situation he was only speaking the word used for the same purpose by Gray himself on Saturday in his presence. Indeed the very fact that an investigation was being made to ascertain the facts demonstrates the lack of malice. (Compare discussion on p. 78, infra.)

As to Mr. Gould the case is the same as with respect to Harbinson. He indeed denied that he had said anything at all of Gray, and those who testified as to conversations with him confirmed that he volunteered no remarks and spoke only when asked for the reason for his check. The evidence is uncontradicted that Mr. Gould felt that he could by his investigation clear things up in a way satisfactory to Gray. (See statement of facts, p. 15, supra.)

We think it self-evident that the occasion was a privileged one and that the communications were made without malice.

3. The authorities demonstrate that the occasion was privileged.

In *McLaughlin v. Standard Accident Ins. Co.*, 15 Cal. App. (2d) 558; 59 Pac.(2d) 631 (hearing denied by the Supreme Court), the plaintiff had for many years been employed by the defendant company. Included in his duties were those of soliciting insurance, collecting premiums, and remitting the money so collected to the company. Having fallen behind in remitting collections and being unable when called upon by the company to pay the amounts claimed to be due, the matter was reported by it to its fidelity bonding company, and the plaintiff's connections with the defendant were terminated. One Pierce was appointed agent in his place, and the plaintiff entered into a contract with Pierce, transferring to him the control of his insurance soliciting business. The manager of the defendant com-

pany then addressed letters to thirty-four policy holders, each of whom was at the time a client of the plaintiff. These letters advised that the plaintiff had made arrangements with Pierce to handle his insurance business, that the plaintiff would still be interested in the business, but requested that all premiums on policies must in all cases be paid directly to Pierce and not to the plaintiff McLaughlin. The letters concluded in this typical way:

> "Our books show that there is an unpaid premium due us of $92.50 on Accident and Health policy dated January 5, 1932. If there is any discrepancy in this, please advise us immediately."

The plaintiff sued for libel, contending that each of the thirty-four customers had already paid the premiums to plaintiff, that he had in turn accounted for the premiums, and that the defendant thus meant to inform the customers that the plaintiff was guilty of the crime of embezzlement and not to be trusted with further premium payments.

The court's opinion discusses several defenses and concludes that, if for no other reason, the plaintiff could not recover because the communication was privileged:

> "In view of our conclusion that the statement made by defendants to the various persons holding policies in the Standard Accident Insurance Company, even if given the meaning attributed to it by plaintiff, was true, it is not necessary to consider at length the further contention of defendants that even if untrue, it was a privileged communication made without malice. In this behalf it is sufficient to say that not only does the evidence show it to have been true, but also that it was made under circumstances entitling it to be regarded as privileged, and the implied finding from the verdict that it was made maliciously is not sustained by the evidence.
>
> "It follows that the trial court erred in denying the motion of defendant for judgment notwithstanding the verdict. The judgment is therefore reversed, and the cause

remanded to the superior court, with direction to enter judgment in favor of the defendants."

Warner v. Missouri Pacific Railway Co., 112 Fed. 114 (Cir. Ct., W. D. Tenn.) The superintendent of the railroad, whose duties included the supervision and management of the railway line, depots and stations, wrote a letter to the grantee of the station lunch and newsstand concessions, calling his attention to an alleged misbehavior of the plaintiff, who was a news agent in charge of the stand, inviting an investigation of the facts. The court said:

> "The letter is a communication by him to another employe of the company, or, what is the same thing, the grantee by contract of the privileges of occupying the station house for the purpose of serving the passengers awaiting there with lunches and other conveniences for their use. It concerns a suggested investigation by that employe of the alleged indecent behavior of a subemploye of the defendant company, or, what is the same thing, the employe of the grantee of the privilege who attended to the lunch stand and served the wants of the passengers in the station house. It is difficult for my mind to conceive a more thoroughly privileged communication, on the most familiar rules of law on that subject, and I have been strongly inclined to dismiss at least the suit of that subemploye on that ground." (p. 115)

The court was of a similar opinion with respect to co-plaintiffs, who were on the occasion to be investigated mere companions of the sub-employee.

Flowers v. Smith et al., 80 S. W. (2d) 392 (Tex. Civ. App.). This was an action for slander against the West Texas Utilities Company, of which plaintiff was a customer. The plaintiff had installed a private power system in his home, thus reducing his electric bill to the company. Being suspicious, the company removed its meter from the porch of plaintiff's home and placed it on a pole thirty feet from the ground. Seeing this done, plaintiff's wife telephoned defendant's manager and asked him why

the meter had been removed from the porch. In reply, the manager went to plaintiff's home and said to plaintiff's wife:

> "I will be frank with you. It is because your husband has been wiring around the meter."

Plaintiff thereupon sued the power company for slander claiming that he had been charged with the offense of stealing electric current, a crime under the Texas law. The court agreed that the words were false and slanderous, but it held that the defendant was protected by privilege, and it affirmed a judgment for defendant on demurrer to the complaint. Because of so many similarities to our case, we quote at length:

> "A solution of the question presented turns upon whether or not the alleged slanderous accusation, * * * was a qualifiedly privileged communication. Perhaps it is more accurate to say that the real question is: Was the occasion in question under the facts alleged a privileged one? If yes, this case should be affirmed.
>
> "* * * The statement attributed to Smith was slanderous per se, and was actionable, unless qualifiedly privileged. The following is an oft quoted and the generally accepted rule in determining such question: 'A communication made bona fide upon any subject-matter in which the party communicating has an interest or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which without this privilege would be slanderous and actionable.' Newell on Slander & Libel (4th Ed.) p. 416, §391.
>
> "* * *
>
> The difficulty here, as always, is not in ascertaining general legal principles, but in making application of these. In discussing a similar situation, the court in Watt v. Longsdon, 69 A. L. R. 1022, * * * quotes the following with approval: *'If fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society.'*
>
> "* * *

> Applying these principles, we have here a case where the husband sues for a slanderous statement made to his wife *at her special instance and request,* concerning a matter in which she was as much interested as her husband. * * * She had a right to make inquiry respecting a matter affecting her household. *Plainly it was the duty of Smith to protect the interest of his company; and that the communication was made in furtherance of such duty is not denied.* It is not contended that such statement was maliciously made, and no inference of such may be drawn from the mere making of the statement, if it were qualifiedly privileged."

Morcom v. San Francisco Shopping News, 4 Cal. App.(2d) 284; 40 Pac.(2d) 940. The defendant published the Oakland Shopping News, which was distributed on doorsteps, porches and yards of residential buildings in Oakland. There was under consideration before the City Council of Oakland a proposed ordinance to prohibit the scattering of advertising matter upon public or private property. The newspaper published articles concerning the attitude of the plaintiff, as Mayor of Oakland, toward the ordinance, impugning his motives. For this the Mayor sued for libel. A demurrer was sustained and judgment rendered thereon. The appellate court held that the communication was a privileged one, as being to a person interested by one who is also interested, or who stands in such relation with the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent. It said:

> "The effect of the ordinance in question would be to prohibit, or, at least, seriously hamper, the continued operation of the distribution of the publication. The subject of the articles complained of would, therefore, be a communication by the defendant (who would naturally be interested therein because it vitally affected its business) to its readers (who would be interested therein because of the information they derived of shopping bargains, sales, etc., which they obtained without cost from their perusal of such publications)." (p. 288)

The judgment was reversed but solely because the defense of privilege is defeated if the publication is made with malice, and it was alleged in the complaint that the publication was made maliciously, an allegation which was sufficient to carry the complaint past demurrer. This decision clearly demonstrates the extensive scope of our California code definition of qualified privilege.

And see *First Texas Prudential Insurance Co. v. Moreland,* 55 S. W. (2d) 616 (Tex. Civ. App.), and *Browne v. Prudden-Winslow Co.,* 186 N. Y. Sup. 350; 195 App. Div. 419.

A comparison of the occasion of the utterances in the present case with any of the several definitions of privilege demonstrates that occasion to have been privileged. Following the definition in *Massee v. Williams,* 207 Fed. 222, 230, quoted on page 26, above, the utterances here were unquestionably made in the course of remarks made for the fair and reasonable purpose of protecting Swift's interests, and also for the fair and reasonable purpose of protecting the interests of the customers to whom they were said, since the interests of the customers required that the books of Swift actually reflect payments made for goods purchased.

Turning to *California Civil Code,* Section 47, Subd. 3, we find that the communication falls within every branch. First, Swift was certainly interested in the matter in hand, namely, the state of the accounts. Second, it stood in such a relation to the parties to whom the remarks were made to afford a reasonable ground for supposing the motive for the communications to be innocent;—the relationship was the business relationship of seller and buyer, creditor and debtor, and the communications referred to sales made and accounts existing. Third, the information given, namely, the reasons for checking the accounts, was requested by the customers, and they were interested in the communication for the reasons already stated.

Again, the communications were privileged within the definition appearing in 36 *Corpus Juris,* 1262, and quoted at page 26,

supra, inasmuch as the communication was made in order to protect the interests of Swift, the matter—the checking of the accounts—was one with which both Swift and the customers were concerned, and one that was reasonably necessary.

The occasion was therefore a privileged one and the communications are protected unless made with actual malice.

4. The question of the existence of privilege was one for the Court.

Where there is no dispute as to the facts and circumstances of an occasion, the question of whether it was privileged is one for the court and not for the jury.

Carpenter v. Ashley, 148 Cal. 422, at 423; 83 Pac. 444:

> "The facts and circumstances under which the words were spoken were undisputed and therefore the question whether they were privileged was a question of law for the court to determine. * * * Sometimes the question of privilege is one of mixed fact and law, and in such case it is proper for the court to submit it to the jury with proper instructions; but where, as in the case at bar, the facts touching the circumstances under which the alleged defamatory words are spoken are not in dispute, the question is for the court."

As stated in *Warner v. Missouri Pacific Railway Co.,* 112 Fed. 114:

> "The question of privileged communication, on the face of the alleged libel, is always one of law for the court on demurrer. 13 Enc. Pl. & Prac. 59. And also it is a question of law when the facts are conclusively developed on the trial." (P. 115)

The authorities could be multiplied (See, e.g. *Jones v. Express Co.,* 87 Cal. App. 246, 256; 262 Pac. 78; *John W. Lovell Co. v. Houghton,* 22 N. E. 1066, 116 N. Y. 520) but it is not necessary.

In the present case there was no dispute at all as to the facts and circumstances under which the remarks, if made at all, occurred. There was not even any dispute as to what Harbinson said. There were disputes as to what Gould said, and there was also a dispute as to whether Gould and Harbinson were acting within the course and scope of their employment. But there was no dispute as to the occasion and circumstances under which was said whatever was in fact uttered. The situation is exactly the same as in *Carpenter v. Ashley,* supra, where there was a dispute as to the speaking of the words, but none as to the occasion of their speaking.

The existence of the privilege was therefore purely a question of law for the court.

5. There was no evidence of actual malice to go to the jury, and the Court should therefore have granted a nonsuit or directed a verdict.

The occasion being privileged as a matter of law, the only question remaining was whether there was actual malice in the speaking of the words. If there was any substantial evidence of actual malice, the court should have presented that issue to the jury on proper instructions. If there was no evidence of actual malice, the court was under the duty of taking the whole case from the jury. *It did neither.* As said in 37 *Corpus Juris,* 107-108, if the occasion is privileged,

> *"the court must determine whether there is sufficient evidence of malice to send the case to the jury, and, if there is not, it becomes the duty of the court to dispose of the case by nonsuit or dismissal, direction of a verdict, or otherwise."*

And see *Townshend* on *Libel & Slander,* Sec. 288.

Newell on *Slander and Libel* (3rd ed.), pp. 1007, 1008, Sec. 981, states:

"The court will generally direct judgment of nonsuit to be entered for the defendant: * * *

(7) If the occasion is clearly or admittedly one of qualified privilege, and there is no evidence, or not more than a *scintilla* of evidence, of malice to go to the jury. *If the evidence adduced to prove malice is equally consistent with either the existence or the nonexistence of malice, the judge should direct a nonsuit; for there is nothing to rebut the presumption which the privileged occasion has raised in the defendant's favor.*"

And in Sec. 394, p. 396, Newell says:

"The presumption in favor of the defendant arising from the privileged occasion remains till it is rebutted by evidence of malice; and evidence merely equivocal, that is, equally consistent with malice or *bona fides,* will do nothing towards rebutting the presumption."

Thus, in *Jackson v. Underwriters Report, Inc.,* 21 Cal. App. (2d) 591, 69 Pac.(2d) 878 (hearing denied by the Supreme Court), a nonsuit was affirmed, because the occasion was privileged and no sufficient evidence of actual malice was produced.

In *Jones v. Express Publishing Co.,* 87 Cal. App. 246, 256, the court said:

" 'It is exclusively for the judge to determine whether the occasion on which the alleged defamatory statement was made, was such as to render the communication a privileged one . . . If, taken in connection with admitted facts, the words complained of are such as must have been used honestly and in good faith by the defendant, the judge may withdraw the case from the jury . . .' (Newell on Libel, 383, sec. 345.)"

Malice cannot be presumed. On the contrary, *Jones v. Express Publishing Co.,* supra, at p. 256, points out:

"And when the facts clearly constitute a privileged communication even though the language employed under other circumstances might be slanderous per se, *the very privilege*

> *creates a presumption that the communication is used innocently and without malice.* (Newell on Libel, 381, sec. 342; Jones on Evidence, 3d ed., 34, sec. 29.)"

And see, also, *Locke v. Mitchell,* 7 Cal.(2d) 599; 61 Pac.(2d) 922.

In *Jackson v. Underwriters Report, Inc.,* supra, the court said:

> "And Section 48 of said Code provides that malice is not inferred from communications or publications falling within the provisions of subdivisions 3, 4 and 5 of said Section 47." (P. 593)

To the same effect is *Misao Yoshemura Kurata v. Los Angeles News Pub. Co.,* 4 Cal. App.(2d) 224; 40 Pac.(2d) 520.

As said in *First Texas Prudential Ins. Co. v. Moreland,* 55 S. W.(2) 616, 620 (Tex. Civ. App.)

> "The occasion being privileged, the presumption of good faith obtained. The burden was on the appellee to rebut this presumption."

Actual malice requires a motive to do harm—a wicked motive. It refers to an evil cast of mind. It is the "malice of malevolence" (*Yankwich, "Essays on the Law of Libel",* p. 133). If there is no evidence of a motive to injure, a nonsuit or directed verdict *must* follow. *Lovell Co. v. Houghton,* supra; *Hemmens v. Nelson,* 34 N. E. 344, 138 N. Y. 174, approved in *Davis v. Hearst,* 160 Cal. 143, at 164 (116 Pac. 530), where it is said:

> "It should be added that when the Civil Code (Sec. 47) speaks of privileged publications, and in Section 48 declares that malice is not inferred from the publication of such matters, it means nothing but this malice in fact, as abundantly appears from the authorities above cited, and as is expressly laid down in such cases as *Hemmens v. Nelson,* 138 N. Y. 174 [34 N. E. 342, 20 L. R. A. 440], and Clark v. Molyneux, 3 Q. B. Div. 246. And, finally, it should be remarked that in all classes and kinds of cases in which exemplary damages are sanctioned, there must be made to appear to the satisfaction of the jury, *the evil motive, the*

animus malus, shown by malice in fact, or by its allied malignant traits and characteristics evidenced by fraud or oppression."

In *First Texas Prudential Ins. Co. v. Moreland,* supra, an express jury finding of malice was held to be unfounded and the cause reversed. The case involves utterances made in the checking up of shortages in an employee's accounts.

In *Jackson v. Underwriters Report,* supra, the court remarked that there was evidence of no feeling of any kind, either for or against the party supposedly defamed, and that therefore nonsuit must follow. *A fortiori* the same result must follow where the feeling of those speaking was a friendly one.

It must be clear that Harbinson and Gould, both friends of Gray, had no intent to injure him and did not suppose they were saying anything derogatory of him (See pages 14, 17, supra). The very most that may be said of them is that they were careless or failed to exercise judgment in their speech. But *Davis v. Hearst,* 160 Cal. 143, at 167, approving a passage from *Odgers on Libel and Slander,* says:

> "And Odgers, who, it will be remembered, in his learned work declines to consider the existence of any malice but malice in fact, sums up the English law as follows:
>
> " '*Mere inadvertence or forgetfulness, or careless blundering is no evidence of malice.* (Brett v. Watson, 20 W. R. 723; Kershaw v. Bailey, 1 Exch. 743; 17 L. J. Ex. 129; Pater v. Baker, 3 C. B. 831; 16 L. J. C. P. 124) *Nor is negligence or want of sound judgment* (Hesketh v. Brindle, (1888) 4 Times L. R. 199), or honest indignation (Shipley v. Todhunter, 7 C. & P. 690)'."

As a matter of fact in the present case there was no real contention by the plaintiff that any utterances were made with actual malice. Plaintiff's contention was that malice was to be presumed from the saying of the words, and he requested the court to so charge the jury, and this the court erroneously did. These instructions are assigned by us as error. We discuss them on pages 49 to 51, infra.

6. No actual malice of its employees may be attributed to the Corporation.

There is still another reason why, the occasion being a privileged one, the court should have directed a verdict for the defendant. Even assuming that there was some evidence of actual malice on the part of Harbinson or Gould, either or both, their actual malice cannot be imputed to the corporation. It is the rule that where a plaintiff seeks to hold a corporation liable for remarks made by an employee, the corporation cannot be held responsible for the actual malice of the employee, if any, unless it had expressly authorized the employee to slander the plaintiff, or knowing that he had uttered a slander, authorized and approved what he said. In other words, there must be express authorization or express ratification.

This very matter was decided in *Warner v. Missouri Pacific Ry. Co.*, 112 Fed. 114.

The same result is demanded on principle. The principles are fully discussed in *Davis v. Hearst*, 160 Cal. 143; 116 Pac. 530. That case points out that the actual malice necessary to destroy the privilege of an occasion is the same *animus malus* necessary to entitle one to exemplary damages. Exemplary or punitive damages may never be awarded against a corporation for the acts of an employee upon a mere showing of malice of the employee. Where actual malice is no ingredient of the tort, the corporation may be held liable for compensatory damages, but may not be punished for accompanying malice. And where actual malice is necessary to constitute liability for the act, the principal may not be held liable, and the relief must be restricted to the agent personally.

We quote at length from *Davis v. Hearst*, 160 Cal. 143. At pages 164 and 165, following the passage quoted on pages 38 and 39 above, the court said:

> *"Imputed malice in fact.*
>
> "Since the *animus malus* must be shown to exist in every case before an award in punitive damages may be made

against a defendant, since the evil motive is the controlling and essential factor which justifies such an award, it follows of necessity that no principal can be held in punitive damages for the act of his agent, unless the particular act comes within the principal's specific directions or general suggestions, or unless the principal has subsequently ratified it, such ratification presupposing, it is said, original authorization. * * *

"While to the specific proposition that *malice in fact is not imputable to the master merely from the act of the employee,* reference may be made to Haines v. Schultz, 50 N. J. L. 481, [14 Atl. 488] (And other citations) * * * and 4 Odgers on Libel and Slander, 367, where it is said.

" 'In all these cases the malice proved must be that of the defendant. If two persons be sued the motive of one must not be allowed to aggravate the damages against the other . . . *Nor should the improper motive of an agent be matter of aggravation against the principal.*' "

Newell on *Slander and Libel,* (3rd ed.) Sec. 394, p. 396, speaking of malice necessary to defeat privilege, states:

"The facts tendered as evidence of malice must always go to prove that the defendant himself was actuated by personal malice against the plaintiff. In an action against the publisher of a magazine, evidence that the editor or author of any article, not being the publisher, had a spite against the plaintiff is inadmissible."

The identity of the rules respecting malice necessary to destroy privilege and malice essential to punitive damages appears in *Misao Yoshimura Kurata v. Los Angeles Pub. Co.,* 4 Cal. App. (2d) 224, 40 Pac.(2d) 520, where the court says (p. 228):

"The lower court was right in striking the item allowed for exemplary damages as there was no evidence whatever to sustain malice, and malice is not presumed from privileged publications. Davis vs. Hearst, 160 Cal. 143, 116 P. 530; White v. Nicholls, 3 How. 266, 11 L. Ed. 591."

There is, of course, no room for any contention that Swift and Company authorized slanderous remarks by any of its employees or ratified any. If Harbinson was ever instructed to do anything in the premises, he was merely told to take Gray's list (Def. Ex. C) and check the route. Gould was merely instructed to take a list of numbers of missing tickets and find the tickets. There was no ratification of anything that was said because it was not until the action was instituted a year later that the defendant was even aware that slander was supposed to have been said, and it is conceded that none of the officers of the company ever stated to anyone that the plaintiff was guilty of anything but carelessness. (See pages 19, 20, supra.)

7. A nonsuit, a directed verdict or a judgment notwithstanding the verdict should have been ordered.

For the reasons already stated, the trial court should have ordered a nonsuit, granted a directed verdict, or ordered judgment notwithstanding the verdict. Its failure to do so constitutes respectively, our Assignments of Error Nos. I, II, III, and IV, quoted at pages 22 and 23, supra.

8. The Court erred in failing to give certain instructions requested by the defendant on privilege and malice

In addition to its motions for nonsuit, verdict, and judgment, the defendant presented the question of privilege and the allied question of malice to the court by request for instructions. If the motions were for any reason properly denied, the issue should have been presented to the jury on an appropriate charge. But the trial court refused *each and every request* on the subject and gave to the jury no inkling that such a defense as privilege was recognized by law. Indeed, as we shortly show, it in effect charged the jury to the contrary.

(a) On privilege itself.

The Assignments of Error involved on this point are:

VIII. (R. 30, 31)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 17, reading as follows:

" 'Sometimes remarks are made in circumstances and on occasions which the law calls "privileged." If a remark is made on a privileged occasion, then even though it is not true and is defamatory, nevertheless it is not regarded as slanderous, and there is no liability unless the words were spoken maliciously, that is to say, with actual malice. If a statement or remark is made without malice by a person interested therein to another person interested therein, it is a privileged publication.'

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon their verdict."

XVI. (R. 36)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 25, reading as follows:

" 'A communication, though in fact unfounded in truth, is privileged if made in good faith in the performance of any duty and with a fair and reasonable purpose of protecting the interests of the person making it or the interests of the person to whom it is made. I therefore instruct you that even if you find that the defendant uttered concerning the plaintiff the words complained of, yet if you find that those words were said in good faith in carrying out the company's business and with a fair and reasonable purpose of protecting the interests of the company, then the defendant cannot be held liable even though what was said was not well founded in fact.'

"To which refusal to give said requested instruction, the defendants excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

XIX. (R. 38)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 28, reading as follows:

" 'Even though you find that the defendant made the statements with respect to the plaintiff alleged in the complaint, nevertheless if you further find that the defendant was interested therein and that such statements were made by the defendant in a communication, without malice, to a person interested therein, I instruct you that the publication is a privileged one and that your verdict must be for the defendant. In determining whether or not the communication is privileged, you may consider all the facts and circumstances surrounding the transaction in order to determine whether or not the defendant was interested in the communication and whether or not the persons to whom the communication was made were also interested therein.'

"To which refusal to give said requested instruction the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

Defendant's proposed Instruction No. 25, quoted in Assignment of Error No. XVI follows the language of *Massee v. Williams*, 207 Fed. 222, at 230. Defendant's Proposed Instruction No. 28, quoted in Assignment of Error No. XIX follows the language of *California Civil Code*, Section 47.

These instructions should have been given if the court's failure to take the case from the jury was the result of a belief that the circumstances of the occasion of the alleged utterances were not undisputed.

(b) On imputation of actual malice to Swift.

The Assignments of Error involved are:

XIII. (R. 33, 34)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 22, reading as follows:

" 'Where a plaintiff seeks to hold a corporation liable for remarks made by an employee, the corporation cannot be held responsible for the actual malice of the employee, if there was any, unless it had expressly authorized the employee to slander the plaintiff maliciously, or knowing that he uttered a slander maliciously, authorizes and approves what he said. Consequently, if the occasion of an utterance is privileged within the meaning of the instructions already given to you, a corporation cannot be held liable for utterances of an employee unless first, those utterances were made with actual malice, and in addition, the corporation had expressly authorized the employee beforehand to make the utterance maliciously or thereafter approved of the utterance, knowing of its falsehood.'

"To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

XIV. (R. 34)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 23, reading as follows:

" 'There is no evidence whatever that the defendant corporation ever expressly authorized any employee to utter any of the remarks referred to in the complaint or ever approved of any such utterances, and I therefore instruct you that even if some employee did utter such remarks, no actual malice can be charged to the corpora-

tion. You will therefore return a verdict in favor of defendant and against the plaintiff.'

"To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

XVII. (R. 36, 37)

"The court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 26, reading as follows:

" 'Even if you find that some employee of the defendant, while checking the plaintiff's route, made an utterance concerning the plaintiff, as he alleges in the complaint, and even if you find that the utterance was false and made with actual malice, nevertheless you cannot hold the defendant corporation liable for such remarks, if any, unless such employee had been expressly ordered beforehand to go out and make the remark or afterwards the corporation learned that such a remark had been made and approved of it with knowledge of its falsehood.'

"To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

XVIII. (R. 37)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 27, reading as follows:

" 'There is no evidence whatever in this case that the defendant corporation ever expressly authorized any employee to utter any of the remarks referred to in the complaint or ever approved of any such utterances, and I therefore instruct you that even if some employee did utter such remarks, no actual malice is chargeable to the

corporation. Consequently, in the event you find that such utterances, if there were any, were made on a privileged occasion as has been explained to you, your verdict must be in favor of the defendant and against the plaintiff.'

"To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

These instructions were proper as shown by our discussion at pages 40 to 42, supra.

On the other hand, if for some reason which is not apparent to us, malice, *if any,* of Harbinson and Gould could be legally attributed to Swift, and if the court's failure to take the case from the jury was based on a supposition that there was some evidence from which actual malice on the part of these two employees might be inferred, *then it was the duty of the court to instruct the jury upon the subject of actual malice so that it could find upon the issue.*

We thus come to the next group of instructions.

(c) On the existence of actual malice.

The Assignments of Error involved are:

XII (R. 32, 33)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 21, reading as follows:

" 'Where the facts and circumstances under which an alleged defamatory publication is made are undisputed, the question of privilege is one for the Court. Even if you should find that the defendant uttered of the plaintiff the words set out in the complaint, the circumstances under which they were said are undisputed. The Court has considered the matter and instructs you that the oc-

casions were privileged and that if the words were uttered without actual malice (if, in fact, there were any words said), then your verdict must be in favor of defendant and against the plaintiff.'

"To which refusal to give said requested instruction the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

IX. (R. 31)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 18, reading as follows:

"'If a remark, although not in fact substantiated in truth, is made in good faith and in an honest belief that it is true and without any desire or disposition to injure the party of whom it is spoken and without any spite or ill will toward him, then it is not malicious, and if the occasion is privileged, there is no liability.'

"To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

XI. (R. 32)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 20, reading as follows:

"'In determining whether or not a communication to a person interested therein by one who is also interested is made without malice, malice is not to be inferred from the mere fact of communication.'

"To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

XV. (R. 35)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 24, reading as follows:

> " 'If an employee of the defendant was sent out by the defendant to interview customers on the plaintiff's route for the purpose of checking up to ascertain what sales the plaintiff had made and what moneys he had collected, if any, then even if you should find that while engaged in that task such employee made the remarks referred to in the complaint to a customer, I instruct you that if the employee acted in good faith and in an honest belief that what he said was true and without any desire or disposition to injure the plaintiff and without any spite or ill will toward him, the remarks were privileged, and even if they were false and derogatory, the defendant cannot be held guilty of slander, and the plaintiff is not entitled to recover damages because of such remarks.'

"To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

Defendant's Proposed Instruction No. 20, quoted in Assignment of Error No. XI supra, follows the language of *California Civil Code,* Section 48. Defendant's Proposed Instruction No. 18 quoted in Assignment of Error No. IX is based on the language of *Davis v. Hearst,* 160 Cal. 143; 116 Pac. 530. The correctness of the instructions quoted in these Assignments of Error is shown by the discussion on pages 26, 38, 39, supra.

9. The Court erred in giving certain instructions

Not only did the court refuse to give *any* instructions on privilege requested by defendant, but on the contrary it did give the plaintiff's requested instructions Nos. 10 and 11, which

charged the jury directly to the contrary of the law as set forth in our Proposed Instruction No. 20.

Our Assignments of Error on the subject are:

VI. (R. 27)

"The Court erred in giving to the jury, during the course of the charge to the jury, the following instruction, which was Plaintiff's Requested Instruction No. 10, to wit:

" 'I instruct you that a man intends the natural consequence of his acts. If, therefore, the jury believes and finds from the evidence that the natural consequences of the publication complained of was to defame and injure plaintiff in his reputation and character you may properly infer such was the intention of defendant.'

"To said instruction the defendant, at the conclusion of the Court's charge and in the presence of the jury and before the jury had retired to deliberate on its verdict, objected on the following grounds:

* * * * * * *

" '(b) The present is a case of qualified privilege (see defendant's Proposed Instructions Nos. 17, 21, 24, 25 and authorities there cited). In such a case malice must be proved, and there is no presumption of intention or malice inferred (Civil Code, Section 48).

* * * * * * *

and then and there excepted to said instruction."

VII. (R. 28)

"The court erred in giving to the jury, during the course of the charge to the jury, the following instruction which was Plaintiff's Requested Instruction No. 11, to wit:

" 'In an action for slander, the law implies some damage from the uttering of actionable words, and the law further implies that the person using the actionable words intended the injury the slanderer is claimed to effect, and in this case if you find for the plaintiff upon that part of the complaint alleging slander you will de-

termine from all the facts and circumstances proved what damages are to be given him, and in assessing the damages you are not confined to any mere pecuniary loss sustained. Physical pain, mental suffering, humiliation, and injury to the reputation of character, if proved, are proper elements of damage.'

"To said instruction the defendant, at the conclusion of the Court's charge and in the presence of the jury and before the jury had retired to deliberate on its verdict, objected on the following grounds:

"'(a) Defendant objects on all the grounds stated in the objection to Plaintiff's Requested Instruction No. 10. * * * and then and there excepted to said instruction'."

These instructions were of course error, to the extent that they charge that a man is presumed to intend the consequences of his act and that therefore if the utterance was defamatory defendant was presumed to have intended to defame and injure plaintiff. The court thereby charged that malice was to be inferred from the mere saying of the words. We have already referred to *Civil Code,* Section 48, and to several other authorities, that the malice with which the law is concerned in cases of privilege is actual malice, which may not be so presumed (pp. 37, 38, supra).

Davis v. Hearst, 160 Cal. 143, refers to this same matter, and says (p. 166):

"The presumptions that an unlawful act was done with an unlawful intent and that a person intends the ordinary consequences of his voluntary act (Code Civ. Proc., sec. 1963) are, in libel, presumptions going to malice in law and not to malice in fact."

10. Conclusion on Privilege.

No matter how the subject is viewed, the trial court committed gross error. Its action can be explained only upon the assumption that it held that the present case did not involve a

privileged communication at all, and that the existence of actual malice was unnecessary to a recovery. Only if that is a correct view of the case may the judgment be affirmed.

We submit that the judgment should be reversed, with directions to enter judgment for defendant.

II.

APPELLANT'S EMPLOYEES WERE NOT ACTING IN THE COURSE OR SCOPE OF THEIR EMPLOYMENT IN MAKING THE ALLEGED UTTERANCES.

A. Assignments of Error Involved.

II. (R. 24)

"The Court erred in denying a motion made by the defendant at the close of all evidence for a directed verdict in favor of the defendant. The said motion was made as follows: 'I move, if the Court please, that the jury be directed to return a verdict for the defendant on the ground * * *

" 'And further, on the separate ground that there is no proof showing, or tending to show, that the persons who are alleged to have made the statements had authority so to do, or that they made the statements in the course of their employment, or that either of them made the statements under the authority of the defendant.'

"The Court denied said motion for a directed verdict, to which ruling defendant by its counsel then and there excepted."

III. (R. 25)

"The Court erred in denying the defendant's motion for judgment notwithstanding the verdict, said motion being made before judgment had been entered upon the verdict. The motion was as follows: 'I move for judgment in favor of the defendant, notwithstanding the verdict, on the grounds stated in support of my motion for a directed

verdict, to-wit, * * *; secondly, on the ground that any communications made were not made by the defendant or by anyone authorized by the defendant, and that no communication was made by anyone within the scope of his authority.'

"The Court denied said motion for judgment notwithstanding the verdict, to which ruling the defendant then and there excepted."

Other assignments of error (XX to XXIII, inclusive), having to do with the refusal by the court to give requested instructions on the subject of authority, are set out in preface to specific parts of the subsequent discussion (pp. 56, 58, 63, 64, 70).

Still others, Nos. XXVII to XXXIV (R. 45-50) XXXVI (R. 52), and XXXVIII to XLII (R. 53-56), have to do with admission in evidence of testimony of the utterances of Gould and Harbinson. The point of each assignment is the same; the authority of the employee being unestablished, remarks by him were not remarks of the defendant but pure hearsay. Since these assignments occupy several pages, they are set out in the Appendix, pages 1 to 8, but are discussed at pages 63 and 69 below.

B. Summary of Argument.

A corporation is liable for slander for remarks of an employee only if made in connection with the very same duty he was engaged in or instructed to do for his employer at the moment of the remark. Plaintiff seeks to hold Swift for remarks of Harbinson and Gould. Unless it is responsible for the remarks of both, a reversal is required. Harbinson was merely employed as a relief salesman; he had no authority to check the route because Mr. Everett, who supposedly told him to do so, was himself without authority in the premises. Gould had authority to check the route, but that did not include authority to make the remarks complained of. Consequently the remarks of neither Harbinson nor Gould are imputable to Swift.

C. Discussion of the Subject of Authority.

Swift is a corporation, and the plaintiff sought to hold it responsible for utterances made by an employee, Eugene Harbinson, and for similar remarks supposedly made by another employee, Charles P. Gould.

It was at one time generally held—and with considerable reason—that a corporation could not be held for slanderous utterances of an employee, particularly a non-officer, unless the corporation had expressly directed or authorized him to speak the words or had subsequently ratified them (10 *Fletcher on Corporations,* Perm. Ed., Sec. 4888, p. 402). This is still the minority rule (10 *Fletcher,* p. 413). It is the present majority rule that a corporation may be held for slander for remarks of an employee in the same circumstances in which it may be held for libel by him.

There seems to be no decision by the California courts on the subject of slander by a corporation, and there is consequently no rule of decision binding upon this court. We know that suits for defamation are regarded by the courts of this state without favor; that suits for slander are rare; and that suits against corporations for slander, if there have been any, appear never to have reached the appellate courts of this state. We nevertheless are prepared to proceed upon the assumption that the courts of California would follow the majority rule.

Even under that rule, it is clear beyond dispute that Swift can not be held responsible for any remarks of Eugene Harbinson, and we think that a sound analysis will demonstrate that it is likewise not responsible for any remarks of Charles P. Gould.

1. Unless Swift is responsible for the remarks of both Harbinson and Gould, the judgment must be reversed.

If it be decided that Swift is responsible neither for the remarks of Harbinson nor the supposed remarks of Gould, the

case should be reversed with directions to enter a verdict for the appellant. If it be decided that Swift is responsible for remarks supposed to have been made by Gould but not for remarks made by Harbinson, the judgment must be reversed and the case at least remanded for a new trial. This consequence necessarily flows from the following facts.

Harbinson was a witness for the plaintiff. He testified that he made the remarks in question to several customers, and, save in the case of Lawrence Lewin of Larry's Groceteria, there was no conflict in this evidence. On the other hand, while three witnesses testified that Mr. Gould made certain remarks on two occasions, Gould himself testified for the defendant and denied that he made any such remarks. Gould was an individual of convincing personality. For all that appears the jury may have believed Gould, and it may have rested its verdict entirely upon remarks made by Harbinson as to which there was no conflict. The trial court was requested to instruct the jury that Swift could not be held responsible for any utterances of Harbinson. (See Assignment of Error No. XX, R. 39, discussed at pages 58 to 63, below.)

If this instruction had been given, the jury would have definitely been informed that it could return a verdict for the plaintiff only if it believed that Mr. Gould made some of the remarks in question. Since the emphasis of the plaintiff's case was upon remarks by Harbinson, and since Gould denied that he made any remarks, it is clear the case must be remanded for a new trial in event that requested instructions should have been given.

2. Statement of the general principles governing liability of a corporation for slander for remarks of an employee.

Accepting the majority rule of liability of a corporation for slanderous remarks of an employee, it is not enough that the remarks be made by an employee. They must be made by one

acting in the course and scope of his employment, and the test is a strict one.

Summing up the decisions on the subject generally, the principle may be stated thus: The fact that an employee, at the time he makes a derogatory statement about another, happens to be engaged in some service for his employer, is not enough to make his employer responsible for such remarks. In order to charge the employer, the remarks must be made in connection with the very duty in which the employee was employed to do or which he was instructed to perform for his employer at that time. In other words, the employee must have been engaged or assigned by his employer to act upon or in relation to the very subject matter with which the remark is connected at the very time the remark is made. *Washington Gas Light Co. v. Lansden,* 172 U. S. 534, 43 L. ed. 543, 19 Sup. Ct. 296; *International Text Book Company v. Heartt,* 136 Fed. 129 (C.C.A. 4th); *O'Brien v. B. L. M. Bates Corporation,* 208 N. Y. S. 110, 211 App. Div. 743; *Vowles v. Yakish,* 179 N. W. 117, 191 Iowa 368.

3. A mere truck route salesman of Swift would have been without authority to utter the remarks complained of.

(a) Assignment of Error:

XXIII. (R. 41)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 16, reading as follows:

" 'If you find that some employee of the defendant uttered the alleged derogatory remarks concerning the plaintiff, that is not enough to make defendant responsible. If the employee who made such remarks was a salesman on a route, that fact would not by itself authorize him to speak for the defendant on the subject of the plaintiff and would not make the defendant responsible for any such remarks concerning the plaintiff,

and if the employee did make such remarks in the circumstances described, they are his own responsibility.'

"To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

(b) Discussion.

It requires no minute analysis to show that if a truck driver or salesman for Swift, engaged in making his rounds selling goods, and without any further duty, had made the remarks in question to its customers, Swift could not be held liable because such remarks would be unconnected with the employment of the driver or salesman. A few citations will suffice at this point.

In *First Texas Prudential Ins. Co. v. Moreland,* 55 S. W. (2d) 616 (Tex. Civ. App.) it was held that a mere salesman has no authority to slander another agent, past or present. Moreland, an insurance agent, appeared to be short in his accounts and was discharged. An agent of the company made remarks to certain people of whom he was soliciting insurance, supposedly stating that Moreland had been discharged for crookedness. The court held the company not responsible for the remarks. It said: (P. 621).

"His [the agent's] work was to sell insurance, not to adjust controverted claims relating to insurance collected, or to pass upon the honesty of any other agent, past or present. If an agent selling insurance for appellant made the statement charged, it was without the scope of his authority to represent appellant, entirely outside of the duty he was to perform, and that being so, no liability against appellant resulted. Schulze v. Jalonick, 18 Tex. Civ. App. 296, 44 S. W. 580, 586."

International Text-Book Co. v. Heartt, 136 Fed. 129 (C.C.A. 4th). In this case the plaintiff had been one of the defendant's sales agents, and one Stearn was a district supervisor. Stearn,

the supervisor, charged the plaintiff with embezzlement, and the plaintiff sued the company for slander. It was held error not to give a directed verdict for the defendant. Stearn's agency for the company was conceded, but there was no evidence that the utterances were within the scope of this employment. The court said:

> " 'It may, then, be gathered from the books as a general rule, which is clearly applicable to the facts of this case, that if the servant, instead of doing that which he is employed to do, does something else which he is not employed to do, the master cannot be said to do it by his servant, and therefore is not responsible for what he does.' " (P. 133)

Kane v. Boston Mutual Life Insurance Co., 86 N. E. 302, 200 Mass. 265. An action for slander was instituted on the basis of an utterance by certain solicitors of the company concerning the plaintiff, who was another solicitor. There was an offer to prove the utterance but no offer to prove that what was said was said in the course of employment. The court held that the mere doing of acts could not authorize the inference that they were done in the course of employment and rejected the offer.

The trial court in the present case should therefore have given defendant's proposed instruction No. 16 quoted in Assignment of Error No. XXIII set out on page 56, supra.

4. Swift is not responsible for any remarks of Harbinson.

(a) Assignment of Error:

XX. (R. 39)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 33, reading as follows:

> " 'I instruct you that the defendant corporation, Swift and Company, cannot be held responsible for any utterances made or alleged to have been made by Mr.

Harbinson. The Court finds that the evidence does not establish that Mr. Harbinson, if he made any of the alleged utterances, was acting within the course or scope of his employment.'

"To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

(b) Discussion.

Eugene Harbinson, at the time he made the remarks in question, was acting as a relief truck driver and sausage salesman. If that was the entire scope of his authority—and we so contend,—the company clearly is not liable for the remarks he may have made about Gray, as we have just seen.

To escape this objection it is claimed by plaintiff that Harbinson acted in the further capacity of checking the route to ascertain Gray's collections for the previous Friday. As to this claim we say:

(1) Harbinson did not purport at the time in question to act for the company in checking the route.

(2) Even if he had purported to act for it in the premises, he had no such authority in fact.

(3) Even if he did in fact have the authority to act for Swift in checking Gray's collections, nevertheless his remarks concerning Gray may not be imputed to the corporation. The case would then be the same with respect to him as with respect to Gould.

We here confine our discussion principally to the second of the three points. As to the third, we refer to our discussion at pages 64 to 69 concerning Gould. As to the first, plaintiff's contention is based entirely on the claim that Mr. Everett, the assistant sales manager, had told Harbinson to check the route. There is here a sharp conflict in the evidence. Plaintiff's evidence is that

Gray gave his list to Mr. Everett and that Mr. Everett gave the list to Harbinson asking him to see the customers therein named to find out what they had paid Gray on the previous Friday. On the other hand, Mr. Everett denied that the list had been given to him by Gray, that he had ever seen it until shortly before trial, or that he had ever given any instructions to Harbinson or even discussed the subject with him. Similarly Gould testified that Gray had given the list directly to Harbinson on Saturday afternoon and had requested Harbinson to check the route on behalf of Gray. (See page 9, supra.) If the testimony of Everett and Gould is true, clearly Harbinson was not acting for Swift when he checked the route but was acting for Gray. If the trial court had given the instruction quoted in our assignment of error XXIII (See pp. 56 to 58, above), the jury would have been informed of the necessity of choosing between the stories of Harbinson and Gray, on the one hand, and of Everett and Gould on the other, and the verdict might then be accepted as resolving the conflict on this particular issue of fact in favor of the plaintiff. Since the instruction was not given, the jury may have believed Everett and Gould and yet supposed that Swift was liable for Harbinson's utterances merely because he was a salesman.

However, even if we accept the testimony of Harbinson and Gray upon this subject, the case is in no better position for the plaintiff. We thus come to the second of the three points.

Since whatever authority Harbinson may have had with respect to checking the route emanated from Mr. Everett and from no one else, Harbinson's authority was no greater than Everett's. Water can rise no higher than its source,—and Everett could confer upon Harbinson no greater authority than he himself had. It is not here necessary to consider how far an agent may delegate his authority to another. We may, for the argument, assume that Everett could delegate to Harbinson all the authority that Everett himself had. But even if Mr. Everett himself had personally checked the route and had personally made the re-

marks in question, the company could not be held responsible for them, *because Mr. Everett himself had no authority whatsoever in the premises.* The evidence on this phase of the case is clear and undisputed.

We have already pointed out on pages 15 and 16, supra, that Everett was only the Assistant Sales Manager, and that it was not within the jurisdiction of the Sales Department to check discrepancies with reference to accounts or collections; such matters fell entirely within the department of the auditor, Mr. Hartl. The company had given definite instructions to the sales department that when discrepancies or shortages occurred on a route, the sales department had nothing to do with the matter. Such matters were to be referred at once to the auditor's department, which immediately took charge. This is the undisputed testimony of Mr. Hartl, the auditor, Mr. Everett, the Assistant Sales Manager, and Mr. White, the General Manager of the company. Plaintiff offered no evidence to the contrary. There was no evidence at all that Mr. Everett had any authority in the premises or had ever previously exercised any authority in any like situation. It will be recalled that the cashier, Mr. Hamilton, on Monday morning reported the shortage to Mr. Hartl, and that Mr. Hartl instituted an investigation and check of the route through Mr. Gould. If Everett had authority, Mr. Hartl's investigation would have been a useless duplication of effort.

The mere fact that Harbinson (or even Everett) may have thought he was acting for the company or for its benefit does not create authority in him. In *International Text-Book Co. v. Heartt,* 136 Fed. 129 (C.C.A. 4th.), it is said:

> " 'It is not sufficient that the act showed that he did it with the intent to benefit or serve the master. It must be something done in attempting to do what the master has employed the servant to do.' "

Practical considerations of business management confirm the legal rule and drive us directly to the conclusion that the appel-

lant cannot be held for the remarks of Harbinson. A corporation of the size and complexity of Swift and Company must departmentalize its work or else its affairs will fall into confusion. If any employee or officer at random were permitted to institute an investigation of accounts and to instruct some minor employee or relief truck driver to interview customers on matters of delicacy, and if a corporation were to be held liable for careless remarks made by such youthful and inexperienced individuals, it would become impossible for a corporation to carry on the accounting phases of its business with any safety at all. Such matters must of necessity be left in the hands of the department which by training and experience is qualified to deal with it. If others, however well inclined, however well intentioned their motive, encroach upon the functions of the accounting department, they act beyond the scope of their authority.

As a matter of fact, we think that these considerations demonstrate with certainty that Mr. Everett did not in fact instruct Harbinson to check the route, and that Harbinson did so at the request and as the agent of Gray, his friend. But whatever be the fact, it still remains that if Harbinson did act on Mr. Everett's instructions he was not acting within the scope of his own authority or of any authority which Mr. Everett possessed.

In this connection reference may be had to the leading case of *Washington Gas Light Company v. Lansden,* 172 U. S. 534. There Leetch was the General Manager of the Washington Gas Light Company. A former manager, Lansden, had given testimony before a congressional committee concerning the cost of production of gas, and his testimony was unfavorable to the gas industry. A periodical devoted to the interests of gas producers wrote a letter to Leetch as Manager of the company, inquiring as to Lansden's motives. Leetch replied, stating that a year previous when Lansden was employed by the company he had given testimony inconsistent with his later statements. This reply was untrue and was held to be defamatory. Nevertheless, a judg-

ment based on a jury verdict in favor of Lansden and against the company was reversed by the United States Supreme Court because there was no evidence which would sustain the theory that Leetch acted in the course and scope of his authority. The court's discussion on the subject is excellent but too long to quote.

We submit that the trial court in the present case should have instructed the jury that Swift could not be responsible for any utterances made by Mr. Harbinson.

(c) Error in admission of testimony of utterances of Harbinson.

Assignments of Error Nos. XXVII, XXVIII, XXIX, XXX, XXXI, XXXII, XXXIII and XXXIV (R. 45-51) refer to admissions by the court of testimony of Eugene Harbinson concerning his conversations with customers. Assignments of Error Nos. XXXVI (R. 52) and XLII (R. 56) refer to admissions by the court of testimony of certain customers concerning conversations with Harbinson. The testimony of these conversations should have been excluded because the authority of Harbinson to make the remarks on behalf of the company was not established. In the absence of any such authority such remarks are pure hearsay. (See *Kane v. Boston Mutual Life Insurance Company,* 86 N. E. 302, 200 Mass. 265, and *First Texas Prudential Ins. Company v. Moreland,* 55 S. W.(2d) 616, discussed at pp. 57, 58, supra.) (Assignments quoted, Appendix, pp. 1-5, 7.)

5. Swift is not responsible for any supposed utterances of Gould.

(a) Assignments of Error:

XXI. (R. 39)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 34, reading as follows:

" 'I instruct you that the defendant corporation, Swift and Company, cannot be held responsible for any utterances made or alleged to have been made by Mr. Gould. The Court finds that the evidence does not establish that Mr. Gould, if he made any of the alleged utterances, was acting within the course or scope of his employment.'

"To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

XXII. (R. 40)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 12, reading as follows:

" 'Even if you find that the alleged remarks were made by some employee of the defendant and further that the employee had been sent out by the defendant to check the plaintiff's route, that is, to ascertain what sales had been made and what moneys had been collected by the plaintiff, nevertheless it would not be part of the employee's duties nor connected with his assignment to utter the remarks complained of, and defendant cannot be held liable on account of such remarks.'

"To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

(b) Discussion.

The situation with respect to Charles P. Gould is somewhat different than with respect to Harbinson. Having been authorized by Mr. Hartl, the auditor, Gould unquestionably did have authority from Swift to check the route for the purpose of ascertaining what moneys had theretofore been collected by Gray. Even so, we submit that if Gould made any remarks disparaging of Gray, he was not acting within the course or scope of his

employment, and his remarks cannot be imputable to the corporation. It may be that some cases may be found which go so far as to indicate the contrary. But the far better rule is in our favor. Since there is no decision of the California courts bearing upon the subject matter, this court is free to apply what it deems to be the best exposition of the common law.

Gould's duties in the premises were merely to ascertain *what* the customers had paid Gray on previous collections. He had no duty to ascertain *the reason* for the shortage. He was authorized merely to take a list of numbers of missing tickets and to find the tickets which bore those numbers. That was the extent of his duty. (See statement of facts at page 16, supra.)

Vowles v. Yakish, 179 N. W. 117, 191 Iowa 368, is considered to be a leading case upon the subject of liability for slander of a corporation for remarks of an employee. There Vowles, the plaintiff, had suffered a fire loss and sought to collect from the fire insurance company. The insurance company had an adjuster, Yakish, investigate the matter to determine the amount of the loss. In the course of his negotiations with the plaintiff for an adjustment of the loss, Yakish accused Vowles of having caused the fire. Plaintiff Vowles sued the insurance company for slander. It was decided that Yakish was not acting within the course of his employment or the scope of his duties in making any such remark. Yakish's only duty was to ascertain the *amount* of the loss, *not the reason for it.*

We quote from the court's opinion at length: (P. 119)

> "The real question here to be determined is: Was the defendant, at the time he uttered the words complained of, acting within the scope of his employment, and in the actual performance of his duties touching the subject-matter of the negotiations or transaction. The mere fact that the defendant Yakish was at the time the agent of the insurance company to adjust the loss, and that the defamatory words were used during the negotiations, does not establish liability on the part thereof. [Citation]

"* * * It is, however, manifest from the purpose of the agency that Yakish had authority to adjust and agree upon a settlement of the loss that would be binding upon the company. This is conceded, but is it sufficient to establish liability? * * *

"It will be observed from the foregoing statement that the subject-matter of the negotiations was the extent of the loss, and not the origin of the fire. The latter question does not appear to have entered into the controversy at all. * * * Authority to adjust and settle the loss was all that the business in hand required. * * *

"* * * It is, of course, true that the offensive language was used during the negotiations for a settlement, but, unless they were used within the scope of the agent's employment and while in the actual performance of his duties touching the matter in question, the defendant company is not liable therefor. * * *

"* * * While it is true the meeting of the parties to adjust the loss provided the occasion for the utterance of the slander, we see no more reason for holding that Yakish was acting within the apparent scope of his employment, when he accused the plaintiff of setting fire to his building and stock of groceries, than was the manager of the telephone company when he attempted, by the use of violence, to compel an employee to sign the voucher. We think it manifest that in doing so he was not acting within the scope of his employment. Corporations can only transact business through agents, and, in the absence of some testimony in the case at bar tending to show that the defendant company questioned its liability upon the ground that plaintiff set fire to his building or stock, or that Yakish was authorized and engaged in the investigation of the origin of a fire, or that its origin was in some way involved in the subject-matter of the negotiations, there is nothing to support an inference that at the time the objectionable language was used he was acting within the scope of his employment or authority as the agent of the defendant corporation."

O'Brien v. B. L. M. Bates Corporation, 208 N. Y. S. 110 (211 App. Div. 743). This was an action for slander against the Hotel Belmont, based upon slanderous epithets of the hotel's Assistant Manager, made while he was ejecting the plaintiff from one of the hotel rooms. The assistant manager had authority to make investigation to see if there was improper conduct in any of the rooms and, if he found such conduct, to remove the guilty parties. The court held that when the assistant manager not only ordered the plaintiff from the rooms but in addition applied the slanderous epithets, he was going outside the scope of his employment. His act constituted an independent one, not in anywise within or forming any part of the action called for in the performance of his duty.

The court approved the following statement by Lord Chancellor Loreburn in *Glasgow Corporation v. Lorimer,* 1911, App. Cas. 209:

> " 'I do not think it is good law to say that the corporation is bound by anything said by one of its servants which is connected with the business of that servant. *The question is whether or not there is any authority to communicate on behalf of the corporation any comment or statement of opinion at all.*' "

It also approved the statement of Lord Shaw of Dunfermline in the same case:

> " '* * * It is perfectly true that it was part of Gilmour's duty to look at the receipts given for payments formerly made; but I entirely agree with my noble and learned friends who have preceded me that it was no part of his duty to express his own opinion as to the genuineness of such documents. * * * *If, however, it were to be held that persons in the ordinary and comparatively humble position of this officer were within the scope of their employment in expressing opinions as to the conduct of those with whom they have dealings in the course of doing their work, the consequences might be of the most serious character, and the essential justice which underlies the maxim qui facit per alium facit*

> *per se would disappear.* In my opinion that maxim does not apply; and responsibility for the servant's alleged slander does not attach to the employer.' "

The remarks of Lord Shaw of Dunfermline are most appropriate. If employees in the comparatively humble positions of Gould and Harbinson are within the scope of their employment in expressing opinions as to the conduct of another employee, Gray, when their task was merely to sell goods, or at the most to ask for and to look at the customers' sales tags, the essential justice in the doctrine of respondeat superior has indeed disappeared and the conduct of business is seriously impaired.

The court, in the *O'Brien* case, also approved the following statement in *Duquesne Distributing Company v. Greenbaum,* 121 S. W. 1026, 135 Ky. 182, itself a leading case:

> " 'Slanderous words are easily spoken, are usually uttered under the influence of passion or excitement, and more frequently than otherwise are the voluntary thought and act of the speaker. Or, to put it in another way, the words spoken are not generally prompted by or put into the mouth of the speaker by any other person, and represent nothing more than his personal views or opinions about the person or thing spoken of. If principals or masters could be held liable for every defamatory utterance of their servants or agents while in their service, it would subject them to liability that they could not protect or guard against. No person can reasonably prevent another, not immediately in his presence, from giving expression to his voluntary opinions, however defamatory they may be. It would be entirely out of the question to hold the principal or master responsible for every reckless, thoughtless, or even deliberate speech made by his agent or servant concerning or relating to persons that the agent or servant may meet, or know, or come in contact with while in the service of his principal or master.' "

Sawyer v. Norfolk & S. R. Co., 54 S. E. 793, 142 N. C. 1. There the plaintiff Sawyer called upon the superintendent of the

defendant railroad company to apply for a job. He was refused the position, and the superintendent then accused him of various dishonest acts. The plaintiff sued the defendant corporation for slander. It was held that there was no liability. Even though the superintendent had full authority to employ or reject the plaintiff, it was held that he went beyond the scope of his employment when he proceeded to insult and defame the plaintiff in the course of rejecting the application. And so, in the present case, Gould had authority to check for missing tickets, but he went beyond his authority or any fair incident of it, if he made disparaging remarks about Gray. His task was to find the shortage, not to ascertain the cause of the shortage.

(c) Errors in admission of testimony of utterances of Gould.

Assignments of Error Nos. XXXVIII, XXXIX, XL and XLI (R. 52-55, Appendix, pp. 6, 7) have to do with admissions by the court of testimony of customers concerning purported conversations with Mr. Gould during the course of which Mr. Gould is supposed to have made some of the allegedly slanderous remarks. Since the authority of Gould to act on behalf of the corporation in the premises was not established, it was error to admit this testimony. (See authorities cited on pages 57, 58, supra.)

6. The Court should have granted a nonsuit, directed a verdict, or entered judgment for defendant notwithstanding the verdict.

If Gould was acting beyond the scope of his authority in making any of the alleged remarks, *a fortiori* Harbinson was acting beyond the scope of his authority. We therefore submit that the trial court erred in refusing to direct a verdict for the defendant (Assignment of Error No. II, R. 24, p. 52, above), and it likewise erred in denying defendant's motion for judgment (Assignment of Error No. III, R. 25, p. 52, above).

7. Further errors with respect to authority.

In conclusion it may be added that the court erred as stated in Assignment of Error No. XXII-A (R. 41):

> "The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendant's Proposed Instruction No. 14, reading as follows:
>
> " 'The law does not hold an employer liable for every defamatory utterance of an employee. It does not hold an employer responsible for every reckless, thoughtless or even deliberate speech made by an employee concerning or relating to other persons while he is in his employer's service.'
>
> "To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

The language of this instruction is derived from *Duquesne Distributing Company v. Greenbaum,* 121 S. W. 1026, 135 Ky. 182, quoted supra. In view of the history of the law concerning the liability of a corporation for slander, the strictness with which the courts require the authority of the employee to be proved, the evil which may flow from holding a corporation for the careless or thoughtless remarks of employees and the essential injustice of requiring Swift to apply a money poultice to assuage the feelings of Gray for wounds inflicted by his own friends, one of whom was his chief witness, the jury ought to have been instructed upon the subject with an explicitness defying ambiguity.

III.

THE PLAINTIFF AND APPELLEE GRAY IS IMPALED ON THE HORNS OF A DILEMMA BETWEEN PRIVILEGE AND AUTHORITY

For the reasons already stated we think it clear both that the words uttered were protected by the doctrine of privilege, and also that those who uttered them acted beyond the course and scope of their employment. Moreover, if both defenses are not applicable, one of the two must be. The plaintiff is on the horns of a dilemma. If the statements complained of are so connected with the task of checking the route as to be within the course and scope of the duties of the employees, they were then such a natural part of the task as to be protected by the privilege. On the other hand if they were so disconnected with the task of checking the route as to fall outside the protection of the privilege, they certainly were beyond the course and scope of the employment.

IV.

THE WORDS UTTERED AND SUPPOSED TO HAVE BEEN UTTERED BY HARBINSON AND GOULD ARE BOTH TRUE AND, AS A MATTER OF LAW, NONDEFAMATORY.

A. Assignments of Error.

XXIV. (R. 42)

"The Court erred in refusing to give to the jury the following instruction requested by the defendant and referred to as Defendants' Proposed Instruction No. 5, reading as follows:

'The meaning of the language used in an alleged defamatory publication is in the first instance a question for the Court to decide. Where language is unambiguous, it is the province of the Court to determine its construction and determine whether it is capable of the defamatory meaning which the plaintiff claims for it. The plaintiff claims that the defendant said of him that

"Harry (meaning the plaintiff) is short in his accounts with the company." The Court has considered these words, and it concludes that these words do not mean and are not reasonably capable of being understood to mean that plaintiff has been guilty of embezzling funds of the defendant entrusted to his care as an employee of defendant. I therefore instruct you that even if you find that the defendant spoke those words of plaintiff, nevertheless it cannot be guilty of slander and you cannot render a verdict against the defendant on account of those words.'

To which refusal to give said requested instruction the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

XXV. (R. 43)

"The Court erred in refusing to give to the jury the following instruction requested by the Defendant and referred to as Defendant's Proposed Instruction No. 6, reading as follows:

'The plaintiff claims that the defendant said of him that "He (meaning the plaintiff) has collected money of the company and has not turned it in." The Court has considered these words, and it concludes that these words do not mean and are not reasonably capable of being understood to mean that plaintiff has been guilty of embezzling funds of the defendant entrusted to his care as an employee of defendant. I therefore instruct you that even if you find that the defendant spoke those words of plaintiff, nevertheless it cannot be guilty of slander, and you cannot render a verdict against the defendant on account of those words.'

To which refusal to give said requested instruction, the defendant excepted in the presence of the jury, after the Court had given its instructions to the jury, and before the jury had retired to deliberate upon its verdict."

B. Discussion.

1. Unless words are ambiguous, it is for the court to decide whether they are defamatory. Their meaning cannot be enlarged by the innuendo of the complaint.

The meaning of the language used in alleged defamatory publications is in the first instance a question for the court. If the language is not ambiguous, it is for the court to decide whether it is defamatory. The innuendo of a complaint cannot add to or vary the meaning of the words or make defamatory what is not defamatory.

16 *Cal. Jur.* 121; *Mellen v. Times-Mirror Co.* 167 Cal. 587, 140 Pac. 277; *Jackson v. Underwriters Report, Inc.* 21 Cal. App.(2d) 591, 69 Pac.(2d) 878; *Grand v. Dreyfus,* 122 Cal. 58, at 61, 54 Pac. 389; *des Granges v. Crall,* 27 Cal. App. 313 at 315, 149 Pac. 777; *Chavez v. Times-Mirror Co.,* 185 Cal. 20 at 25, 195 Pac. 666.

We quote from the *Jackson* case, supra, in the Appendix, at pages 8, 9 for illustrative purposes.

2. There is in this case a definite variance between the allegations of the complaint and the proof.

The complaint alleges that the defendant spoke of the plaintiff (R. 2):

> "Harry is short in his accounts with the company. He has been taking the company's money. He has collected money of the company and has not turned it in."

The complaint adds the innuendo that these words meant that the plaintiff had been guilty of embezzling funds of the defendant. As just noted, the innuendo can add nothing, since the words are clearly not ambiguous. It will be seen that there are three distinct sentences in the passage of which complaint is made: (1) "Harry is short in his accounts with the com-

pany." (2) "He has been taking the company's money." (3) "He has collected money of the company and has not turned it in."

The proof shows that the words charged were not spoken to anybody as a single whole, and so each sentence must be construed of itself. There was evidence of utterances to eleven people. Harbinson spoke to eight, and Gould supposedly to three. (See pp. 10-12, 17-18, supra.) To three of the eight, Harbinson said merely that Gray was short in his accounts (p. 12, supra). To two of the three to whom Gould supposedly spoke, plaintiff's evidence is that Gould only said that Gray was short in his accounts (p. 17, supra). Thus to five of the eleven people, this was the only remark claimed to have been made.

To his remarks to five people, Harbinson, according to his testimony, added the words: "as (or 'and') he had not turned in the money to the company that he had collected." (p. 12 supra). Of these five, one (Lawrence Lewin) testified and denied that any remark at all had been made to him about Gray. (pp. 12, 13, supra).

To no one at all was it said by anyone that Gray had taken money belonging to the company. There were only two persons with respect to whom there was any testimony of any statement even resembling such a remark, and in each instance the testimony sharply conflicts with other evidence. We discuss this phase of the case at pages 77 to 79, below.

Now, the court was requested by the defendant to charge the jury that the utterances "Harry is short in his accounts with the company" and "he has collected money of the company and has not turned it in" were not defamatory. (See Assignments of Error Nos. XXIV and XXV). If the jury had been so charged and had still returned a verdict for the plaintiff, it might be assumed that it had resolved the conflict and had decided, although upon very tenuous evidence indeed, that Harbinson or Gould had in fact said of Gray that he had

taken money belonging to the company. But the jury was not so charged and was left to assume that on the mere basis of the undisputed utterance of Harbinson that Gray was short, it could find for the plaintiff.

Consequently, a reversal must follow, if the statements that Gray was short is true, or if it is as a matter of law non-defamatory. The same is true with respect to the statement "he has collected money of the company and has not turned it in." (See *Christal v. Craig,* 80 Mo. 367, from which we quote a passage precisely in point, in the Appendix at page 9.)

3. The statement "Harry is short in his accounts with the company" is both true and as a matter of law not defamatory.

The statement that Gray was short in his accounts was an objective designation, a description of a state of affairs containing no element of criminal imputation. It indicated merely that goods belonging to Swift had been checked out to the salesman and had been sold by him, that the purchase price had been received by him, and that there had not been a full accounting to the company. We refer to the Statement of Facts, pages 4-9, 19-20, supra, and here briefly summarize. Gray himself testified that the sales tags were charged to him and in turn credited only when they came back (R. 111). Until they came back to the person designated to receive them, he was "short." It was a conceded fact and Gray himself realized that he remained responsible for moneys collected by him even though those moneys had been lost through no wrong or even through no fault of his, and the term "shortage" was first used in this case to describe the situation by Gray himself (pp. 7-9, supra).

Whether Gray was short through carelessness or misfortune, or because someone else had stolen the moneys, he nevertheless was short. He admitted that the officers of the company had

never claimed that he had stolen any money but merely that he was "short"; .ie., his account did not balance. Those officers testified that it was not a question of whether he took the money but that they had not received it and an employee was not relieved of responsibility until he had turned it in.

That there was a shortage is therefore true.

Moreover, as a matter of law the statement that Gray was short in his accounts, whether true or false, is not defamatory. It is an unambiguous statement; it means a lack of accounting balance; it contains no imputation of wrongdoing. This was clearly the understanding of plaintiff's own witnesses, Mr. Harbinson and Mr. Montemagni, as shown by their testimony which is fully discussed in the Statement of Facts, pages 13 to 15, supra.

The authorities confirm us:

Pittsburgh A. & M. Railway Co. v. McCurdy, 8 Atl. 230, 114 Penn. St. Rep. 554. We discuss and quote at length from this case in the Appendix, pp. 9-11. It is approved by Judge Leon R. Yankwich in his *"Essays in the Law of Libel,"* p. 26.

Hoffland v. Journal Company, 60 N. W. 263, 88 Wisc. 369. This case involves the term "shortage", and we quote from it in the Appendix, pp. 11, 12.

Ferguson v. Houston Press Co., 1 S. W.(2d) 387, (Tex. Civ. App.). This also involves the term "short". (See Appendix, p. 12.)

See also, *McLaughlin v. Standard Accident Insurance Company,* 15 Cal. App.(2d) 558, 59 Pac.(2d) 631; *First Texas Prudential Insurance Co. v. Moreland,* 55 S. W.(2d) 616 (Tex. Civ. App.); *Missouri etc. R. R. Co. v. Moses,* 144 S. W. 1037 (Tex. Civ. App.); *Christal v. Craig,* 80 Mo. 367.

4. The statement "He has collected money and has not turned it in" is both true and, as a matter of law, not defamatory.

The further statement, "he has collected money of the company and has not turned it in" is likewise both true and as a matter of law not defamatory. Little need be added to what we have already said. The money had not in fact been turned into the company because it had not been received by the department to which an accounting should have been made. Moreover, the statement was not defamatory because it did not imply criminality or dishonesty. The failure to turn the money in "might have resulted from mere neglect or inefficiency, or from mere mistake or accident." *Pittsburgh A. & M. Railway v. McCurdy,* supra.

5. The further utterance supposedly made was nondefamatory.

The further utterance charged in the complaint is the statement "He has been taking the company's money."

There is not one word of evidence that this statement was ever uttered to anybody. There is the testimony of one witness, Fred Langbehn (p. 18, supra), denied by Gould (p. 18, supra), that a statement was made by Gould, "it seemed Harry Gray had taken some of Swift's money." There is the testimony of another witness, Emmett Arjo, (p. 13, supra)—in conflict with the testimony of plaintiff's own witness Harbinson (pp. 12, 15, supra)—that Harbinson on one occasion said "Mr. Gray had been accused of taking money from Swift *and he was checking up to see how much he paid him."**

We submit that statements such as these are not defamatory, even if made. In the first place, words must be construed as a

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*It is hardly credible that any one in fact has said that Gray had taken money belonging to Swift, for no one ever entertained that thought concerning him. Statement of Facts, pp. 19, 20, supra.)

whole *in the entire context of both words and circumstances* in which they occur. *Townshend on Slander and Libel,* 4th Ed. pp. 120, 121, Sec. 134 (quoted in Appendix, p. 12); *Townshend.* Sec. 137; *Stevens v. Storke,* 191 Cal. 329, 334, 216 Pac. 371; *Van Vactor v. Walkup,* 46 Cal. 124.

Where one portion of a statement is offset by the remainder, under the doctrine of *"the bane and the antidote"* it is nondefamatory. See *Judge Leon R. Yankwich, Essays in the Law of Libel,* pp. 29, 30. We quote from Judge Yankwich, in the Appendix, p. 15.

In the present case, the statement, if made, that Gray had been accused of taking money *was coupled with the further statement that for that reason Swift was checking up. Not only was the reason stated in words but the check or investigation was the very circumstance in which the utterance was placed.* It thus appeared that Swift was making no accusations but was reserving judgment or opinion until it had an opportunity of ascertaining the facts. Consequently, if there was any bane in the statement, it was coupled with its antidote. The listener who would assume from the alleged statement that Gray had embezzled money would himself have been guilty of a gratuitous assumption made in the face of express information that Swift did not know but was trying to find the facts. *Ferguson v. Houston Press Co.,* 1 S. W.(2d) 387, and *Hoffland v. Journal Co.,* 60 N. W. 263, 88 Wisc. 369, reviewed at page 11 of the Appendix, are directly in point. And see *Browne v. Prudden-Winslow Co.,* 186 N. Y. Supp. 350, 195 App. Div. 419 (Appendix, p. 15). See also, Appendix, pp. 14, 15.

There is still a further reason why we think the alleged words were not defamatory. As Judge Yankwich says (*Essays in the Law of Libel,* p. 44), "Where words are alleged to be libelous as charging a crime, a criminal offense must be specifically imputed," and this requires a specific imputation of the essential elements of the offense (although the precision of an indict-

ment is not necessary), including the necessary criminal intent. It has therefore been held that the word "take" cannot by innuendo be construed to mean "steal." *Grand v. Dreyfus,* 122 Cal. 58, 54 Pac. 389; *Christal v. Craig,* 80 Mo. 367.

Judge Yankwich's *"Essays in the Law of Libel"* contains an excellent discussion of this subject, and we quote from it in our Appendix, pages 12 to 14.

V.

EVIDENCE WAS ERRONEOUSLY ADMITTED CONCERNING EFFORTS OF THE PLAINTIFF TO FIND EMPLOYMENT.

Due to lack of space under Rule 24(e) we are placing our discussion of the present matter in the Appendix, pages 15 to 24.

CONCLUSION

It is respectfully submitted, upon the independent basis of each of the four grounds stated at pages 3 and 4, supra, that judgment should be reversed with direction to enter judgment for the defendant.

Dated: San Francisco, California, July 29, 1938.

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Appendix

I.

ADDITIONAL ASSIGNMENTS OF ERROR CONCERNING LACK OF AUTHORITY OF EMPLOYEES OF SWIFT TO MAKE THE REMARKS COMPLAINED OF BY THE PLAINTIFF.

On pages 53, 63 and 69 of the brief, assignments of error are discussed and referred to as set out in the Appendix. They are as follows:

XXVII. (R. 45)

"The Court erred in permitting the plaintiff's witness, Eugene Harbinson, to testify over the objection and exception of the defendant concerning a conversation between the proprietor of the Los Angeles Fruit Market in Burlingame and the witness, as follows:

'Q. Will you just give us the conversation you had with the lady who owned the Los Angeles Fruit Market?

'Mr. Harrison: That is objected to on the ground that it is hearsay, not binding upon this defendant.

'The Court: What is the purpose, Mr. Van Dyke?

'Mr. Van Dyke: To prove the slander.

'Mr. Harrison: We submit it does not show any authority in this witness, so the words spoken by him would not be within the scope of his authority to bind the company.

'The Court: Objection overruled.

'Mr. Harrison: Exception.

'The Court: Yes, exception noted.

'A. I went in and asked this woman if I could see the sales tags which Gray had given her on Friday. After some discussion as to why she wouldn't let me see it, I told her that Mr. Gray was short in his accounts with the company; that I wanted to find out how much she had paid Mr. Gray on Friday.' "

XVIII. (R. 46)

"The Court erred in permitting the plaintiff's witness, Eugene Harbinson, to testify over the objection and exception of the defendant concerning a conversation between one of the proprietors of Monte's Meat Market in San Mateo and the witness as follows:

'Q. Now, will you please give the conversation you had with the man at Monte's Market that you called Al?

'Mr. Harrison: Object to that, if the Court please, on the ground that it is irrelevant, incompetent, and immaterial, and hearsay and not authorized by the defendant.

'The Court: Overruled.

'Mr. Harrison: Exception.

'A. I went in and asked him if I could see the sales tag that Mr. Gray had given him on Friday. He said he did not have it with him, and he wanted to know why, and I said I was out checking Mr. Gray's route, that he had been short in his accounts with the company and that I wanted to find out the amount he had paid.' "

XXIX. (R. 46)

"The Court erred in permitting the plaintiff's witness Eugene Harbinson to testify over the objection and exception of the defendant concerning a conversation between one Lawrence Lewin (known to the witness as 'Larry') and the witness, as follows:

'Q. Now, give us the conversation with Larry?

'Mr. Harrison: Same objection already stated, (that it is irrelevant, incompetent, and immaterial and hearsay and not authorized by the defendant.)

'The Court: Yes, overruled. Exception.

'Mr. Harrison: Exception.

'A. I said that I wanted to see the sales tag Mr. Gray had given him on Friday. There was some discussion as to why I wanted to see it, and I told him that Mr. Gray was short in his accounts and I wanted to find out how much Larry, the owner of the store, had paid Mr. Gray, as he did not turn in his money.' "

XXX. (R. 47)

"The Court erred in permitting the plaintiff's witness Eugene Harbinson to testify over the objection and exception of the defendant concerning a conversation between the proprietor of Economy Market in Menlo Park (referred to as 'Carl') and the witness as follows:

'Q. Now, when you went there, what occurred there, what conversation took place with Carl?

'Mr. Harrison: The same objection, if the Court please,—irrevelant, incompetent, and immaterial, and hearsay.

'The Court: Overruled. Exception.

'Mr. Harrison: Exception.

'(Witness) I wanted to see his sales tag that Mr. Gray had given him on Friday, and we had some discussion as to why I wanted to see it, and he said I merely wanted to compare prices that Mr. Gray had quoted him on Friday. I said, "No," that I was checking Mr. Gray's route, that he was short in his accounts and had not turned any money in.' "

XXXI. (R. 48)

"The Court erred in permitting the plaintiff's witness, Eugene Harbinson, to testify over the objection and exception of the defendant concerning a conversation between one referred to as 'Joe' and the witness, as follows:

'Q. What conversation took place between yourself and Joe?

'Mr. Harrison: My objection may be deemed interposed to that conversation, may it, your Honor (that it is irrelevant, incompetent, and immaterial and hearsay and not authorized by the defendant)?

'The Court: Yes, overruled. Exception.

'Mr. Harrison: Exception.

'(Witness) I asked him if I could see the sales tag for Friday that Mr. Gray had given him and that Mr. Gray was short in his accounts with the company. I wanted to find out how much money he had paid Mr. Gray.' "

XXXII. (R. 49)

"The Court erred in permitting the plaintiff's witness, Eugene Harbinson, to testify over the objection and exception of the defendant concerning a conversation between one Mrs. Lightner and the witness, as follows:

'Q. Will you give us that conversation with Mrs. Lightner, please?

'Mr. Harrison: Same objection, if the Court please, (that it is irrelevant, incompetent, and immaterial and hearsay and not authorized by the defendant).

'The Court: Overruled. Exception.

'Mr. Harrison: Exception.

'(Witness) I asked her if I might look at the sales tag that Mr. Gray gave her on Friday to find out how much she had paid him as he had not turned in the money to Swift and Company.'"

XXXIII. (R. 49)

"The Court erred in permitting the plaintiff's witness Eugene Harbinson to testify over the objection and exception of the defendant concerning a conversation between one of the proprietors of Arjo's Market at Mayfield and the witness, as follows:

'Q. And give us the substance of that conversation with Arjo?

'Mr. Harrison: Same objection, if the Court please, (that it is irrelevant, incompetent, and immaterial and hearsay and not authorized by the defendant).

'The Court: Overruled. Exception.

'Mr. Harrison: Exception.

'(Witness) I asked Arjo if I might look at the sales tag Mr. Gray had given him on Friday and he said, "Why, yes," and he came back and wanted to know why I wanted to look at it, and he said there was some trouble between Mr. Gray and the full line salesman, that they were always fighting for the business, and he wanted to know if I wanted to compare the prices, and I said no. I said Gray was short in his accounts and had not turned the money in to Swift and Company and I wanted to find out the amount.'"

XXXIV. (R. 50)

"The Court erred in permitting the plaintiff's witness Eugene Harbinson to testify over the objection and exception of the defendant concerning a conversation between one of the proprietors of another market in Mayfield and the witness, as follows:

'Q. Give us the substance of the conversation that you had there in the market in Mayfield?

'Mr. Harrison: Same objection as heretofore interposed, (that it is irrelevant, incompetent, and immaterial and hearsay and not authorized by the defendant).

'The Court: Overruled. Exception.

'Mr. Harrison: Exception.

'(Witness) I told him that I wanted to see the sales tag that Mr. Gray had given him on Friday, and he objected to that. So I told him that Mr. Gray was short in his accounts with the company and I wanted to find out how much he paid Mr. Gray as the money was not turned into the company.' "

XXXVI. (R. 52)

"The Court erred in permitting the plaintiff's witness Emmett Arjo to testify over the objection and exception of the defendant concerning a conversation between Eugene Harbinson and the witness, as follows:

'Q. What was the conversation?

'Mr. Harrison: Object to that if the court please on the ground that it is hearsay, incompetent, irrelevant, and immaterial.

'The Court: Overruled. Exception.

'Mr. Harrison: Exception.

'(Witness) Mr. Harbinson asked to see my sales tag. I asked the reason for it and he said Mr. Gray had been accused of taking money from Swift and he was checking up to see how much I paid him. I relied, "I'm sorry; I had no cash dealings with Mr. Gray," that I had a weekly account.' "

XXXVIII. (R. 53)

"The Court erred in permitting the plaintiff's witness Fred Langbehn to testify, over the objection and exception of the defendant, concerning a conversation between Mr. Gould and the witness, as follows:

'Q. Just state what was said?

'Mr. Harrison: Same objection, if the Court please, (that it is irrelevant, incompetent, immaterial, hearsay and no authority proved).

'The Court: Overruled. Exception.

'Mr. Harrison: Exception.

'(Witness) He said the reason he would like to see the bills was it seemed Harry Gray had taken some of Swift's money just before he went on his vacation and they wanted to see just how much he had taken. Nothing more was said. When we arrived at the house, Mrs. Allen got out the bills, and Gould checked the bills we had there with the list he had in his little book. He checked the amounts and the bills with the totals in the books.' "

XXXIX. (R. 54)

"The Court erred in permitting the plaintiff's witness Fred Langbehn to testify over the objection and exception of the defendant concerning a conversation between Mr. Gould and the witness, as follows:

'Q. Did he make any other statements while he was going through the slips with reference to Mr. Gray?

'A. Yes, he said——

'Mr. Harrison: Same objection, (that it is irrelevant, incompetent, immaterial, hearsay and no authority proved).

'The Court: Overruled. Exception.

'Mr. Harrison: Exception.

'A. He said it sure looked kind of bad for Harry because it was here the day before he was supposed to go on his vacation and his cash was missing.' "

XL. (R. 55)

"The Court erred in permitting the plaintiff's witness Polly Guptill to testify over the objection and exception of

the defendant concerning a conversation between Mr. Gould and the witness, as follows:

'Q. Just go on from there. What did he say?

'Mr. Harrison: In order that the record may be clear, we object, if the Court please, on the ground that it is immaterial, irrelevant and incompetent, and no authority proved; hearsay.

'The Court: Overruled. Exception.

'Mr. Harrison: Exception.

'(Witness) Mr. Gould asked to look over the receipts. I asked him why. He answered that the reason was that he was sent out by Swift because Harry was short in his accounts, and he wanted to check up on his cash sales slips.' "

XLI. (R. 55)

"The Court erred in permitting the plaintiff's witness Dorothy Hamilton Kipps to testify over the objection and exception of the defendant concerning a conversation between Mr. Gould and the witness, as follows:

'Q. Just state what was said.

'Mr. Harrison: Same objection as already stated in the case of the last witness (that it is immaterial, irrelevant, and incompetent, and no authority proved; hearsay).

'The Court: Overruled. Exception.

'Mr. Harrison: Exception.

'(Witness) Mr. Gould came in and asked to look over the accounts, saying that there was a shortage and he wanted to see what Mr. Gray's accounts were with Swift. He stated that it was Harry Gray's accounts that were short.' "

XLII. (R. 56)

"The Court erred in permitting the plaintiff's witness Arnold Montemagni to testify over the objection and exception of the defendant concerning a conversation between Mr. Harbinson and the witness, as follows:

'Q. Did you have any conversation with Mr. Harbinson in October of 1934 concerning Mr. Gray?

'Mr. Harrison: That is objected to on the ground that is already stated with respect to the last witness

(that it is immaterial, irrelevant and incompetent, and no authority proved; hearsay).

'The Court: Overruled. Exception noted.

'Mr. Harrison: Exception.

'(Witness) About the time Mr. Gray went on his vacation, Mr. Harbinson took the route and came along and asked me if I could produce some sales tags for the previous week. He told me Mr. Gray was short in his accounts, that is, in collections, and he would like to check on it.' "

II.

FURTHER DISCUSSION OF AUTHORITIES REFERRED TO IN PART IV OF THE BRIEF.

A. The meaning of unambiguous words is for the court.

At page 73 of the foregoing brief we refer to *Jackson v. Underwriters Report Inc.,* 21 Cal. App.(2d) 591, 69 Pac.(2d) 878. The court there stated the following rule:

> "It is well settled, however, that where the words complained of are neither ambiguous nor used in any covert sense, it is for the court to determine in the light of such extrinsic facts as are alleged whether the words are susceptible of the defamatory meaning sought to be attributed to them; and if they are not, then neither inducement nor innuendo can make them a libel by ascribing a meaning to the published words other or broader than the words themselves naturally bear." (p. 597.)

In that case in the course of an article which stated of several fire insurance claimants that they had fraudulently started a fire, reference was had to the plaintiff, Max Jackson, who was the appraiser. The reference said:

> "Appraiser had fire loss also. On cross-examination of the appraiser appointed by the insured, it was revealed that he, the appraiser, whose name is Max Jackson, had

had losses in which he had collected over $40,000 from insurance companies and that after one of his losses he left the country for a period of time." (p. 595.)

The court held that these words "are unambiguous and used in their ordinary sense and could not bear any defamatory innuendo" and held a nonsuit proper.

B. A reversal must follow if defendant's proposed Instructions 5 and 6 or either should have been given.

On page 75 reference is had to *Christal v. Craig,* 80 Mo. 367. In that case the court had to do with a joinder in the complaint of several different utterances of which some did not furnish a good basis for an action of slander. The court said:

> "On principal it must obtain that where the several causes of action are united in one count, and the case is tried on all, and a simple verdict and assessment of damages in favor of the plaintiff, if one or more of the causes of action assigned be bad, so as not to support the verdict, the verdict must be bad as to all. How is it possible for the court to tell whether the jury took one or all the alleged slanderous words into their estimation? How much proof of the imperfect cause, and how much on the good, did the jury consider? Was it the fact proved touching the bad count that influenced the verdict, and if so, to what extent? Would the jury have given any damages of moment on account of the words properly alleged in the petition, without proof of the others?" (pp. 371, 372.)

C. The statement "Harry is short in his accounts with the company." is non-defamatory.

On page 76 of the brief reference is had to *Pittsburgh A. & M. Railway Company v. McCurdy,* 8 Atl. 230, 114 Penn. St. Rep. 554. In that case McCurdy, a discharged conductor, had claimed the right to ride on the company's cars on an employee's

ticket after his discharge. The company thereupon posted a notice stating:

> "H. B. McCurdy has been discharged for failing to ring up the fares collected. Discharged employees are not allowed to ride on employees' tickets."

McCurdy thereupon sued for libel, alleging that the published matter charged him with embezzlement. The court held that as a matter of law the words had no such meaning. Pointing out that it was the duty of a conductor to ring up, i. e., to register, all fares received, it said:

> "Now, the company had a clear right to insist upon the full performance of this duty. It was for many reasons, perhaps, important that it should be faithfully and promptly performed and the company, apart from any anticipated fraud, might well annex the penalty of a dismissal from service for neglect of this duty. But *a failure to perform the duty required might result from mere neglect or inefficiency, or from motives of dishonesty. 'Failure to ring up all the fares collected,' therefore, does not necessarily imply the fraud or dishonesty of the conductor. It does not import the commission of any crime.* Embezzlement is the fraudulent application by one of the money intrusted to his care by another; and, even if McCurdy did fail to ring up all the fares collected, non constat that he embezzled the money. * * *
>
> "Words, it is true, are not to be construed *in mitiori sensu.* It is sufficient if, in their plain or popular meaning, they are libelous; but when they do not in themselves convey the meaning imputed to them in the innuendo, or where they are ambiguous or equivocal, there must be not only in the pleadings, but also in the proofs, reference to some extrinsic matter which will show the sense in which it is claimed they were understood. *Stitzell v. Reynolds,* 59 Pa. St. 490. The plaintiff's default in not ringing up the fares, as we have said, might have resulted from his negligence or inefficiency, or from mere mistake or accident, or from his intentional fraud; *and, if people will draw from the general statement of his discharge on that ground a*

merely possible inference of fraud and embezzlement, which the words themselves in their usual signification did not justify, it is certainly not the defendant's fault.

"* * * the words here employed are not equivocal or ambiguous. *Apart from the unjustifiable inference which the witnesses have drawn,* they are not even alleged to be capable of any but one meaning, and there is absolutely no evidence, as against the railway company, that the words were used *in any other sense than that which in the business was ordinarily attached to them.* The question was therefore for the court to determine whether the words in that sense covered the crime of embezzlement, as charged in the indictment."

On page 76 of the brief reference is had to *Hoffland v. Journal Company,* 60 N. W. 263, 88 Wisc. 369. In that case there was an action for libel against a newspaper for publishing an article of the defendant, who was the ex-treasurer of the county:

"Spoiled a Sensation. An Alleged Shortage at West Superior. Settled by Bondsmen. West Superior, Wis., Feb. 6. A rather sensational feature was promised for the meeting of the county board this afternoon. It is alleged that there was a deficit of $2,500 in the accounts of Ex-Treasurer Dan Hoffland. The supervisors claimed that the books were short $2,500. It is claimed, however, for Mr. Hoffland, that this was for fees collected which belonged to the office, and not to the county. The matter was settled by the bondsmen before the meeting of the board."

The court said:

"The meaning of the words cannot be enlarged by innuendo. The publication is not actionable per se. It does not impute the crime of embezzlement. It is only, in effect, that there was a deficit in the plaintiff's accounts of $2,500, which he claimed were fees collected which did not belong to the county, but to the office; and this is not disputed in the publication. The matter was settled before it came before the board. There was no demand for the money, or for an accounting, or refusal to pay on demand,

charged. The language is far short of embezzlement, or of any other crime. The objection should have been sustained.

"2. The court directed a verdict for the defendant on the evidence, and did right in doing so."

On page 76 of the brief reference is had to *Ferguson v. Houston Press Co.*, 1 S. W.(2d) 387 (Tex. Civ. App.). This was an action for libel brought by the tax collector against a newspaper for publishing of him an article:

"Ferguson Short $1,600.
Criminal Intent not Found
Case therefore not Pressed Further.
Promises to Pay.
No Conspiracy against Him He Admits."

The court said:

"The imputation that an official is 'short', meaning without 'criminal intent,' is justified by the fact that he was inexcusably in arrears for some extended period of time in accounting for and paying over taxes collected, permitting employees to use same on duebills. Such official is legally bound to timely report and account for taxes collected, and untimely failure to do so constitutes delinquency in payment." (p. 391)

D. The further utterance supposedly made was non-defamatory.

On page 78 of the brief, reference is had to *Townshend on Slander and Libel,* 4th Ed. pp. 120, 121, Sec. 134. We quote:

"Whenever language charged to be defamatory has any reference to, or is connected with any other language or event, which affects its meaning or effect, it must be construed in relation to such other language or event, and this, although on the face of the alleged defamatory matter there is no reference to any other language or event."

On pages 78 and 79 of the brief we refer to Judge Leon R. Yankwich's *"Essays on the Law of Libel"*. At pages 44 and 45 of that work the following appears:

"Where words are alleged to be libelous as charging a crime, a criminal offense must be specifically imputed.

"This does not mean, of course, that the alleged crime should be stated with the precision of an indictment.

"But a crime must be imputed therein, with such certainty as to the elements of the offense and the person to whom it is brought home, that on reading it, it can be said that a person certain is charged with a crime certain.

"In *Newell on Slander and Libel,*[3] it is said:

> " 'Where words are sought to be made actionable, as charging the party with the commission of a crime, a criminal offense must be specifically imputed. It will not be sufficient to prove words which only amount to an accusation of fraudulent, dishonest, vicious or immoral conduct, so long as it is not criminal; or of a mere intention to commit a crime, not evidenced by any overt act.'

"If an essential element of the offense is lacking in the written words they will not be held to be libelous *per se,* as charging that offense.

"The element will not be inferred merely from the fact that the words were used.

"Nor will an innuendo to the effect that the words were meant to charge or were understood to charge the offense, supply the deficiency.

"These principles are fully supported by the authorities.

"We give herewith a summary of the most important of them:

"To say of a person that he 'set his house on fire' does not charge *arson*[3a].

"That a library 'had been plundered by him' does not charge *larceny*[4].

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3. 4th Ed., Sec. 202.

3a. Frank v. Dunning, 38 Wis. 270; Bloss v. Tobey, 2 Pick. (Mass.) 320.

4. Carter v. Andrews, 16 Pick. (Mass.) 1.

"Speaking of a public official, that he 'sold out' does not charge *bribery*[5].

"That he was engaged in 'filibustering' does not charge *violation of neutrality*[6].

"That he 'presented forged instruments' does not charge *forgery*[7].

"To say that he had 'wantonly taken the life of an innocent child in violation of the law, does not charge *murder*[8].

"To say that an employee of a railroad company had been discharged 'for failure to ring up all fares collected' does not charge *embezzlement*[9].

"To say that he 'used a company's goods and money for his private use' does not charge *fraud and embezzlement*[10].

"To ask in writing concerning a district attorney charged with the enforcement of the law and referring to the source of the money used in his campaign, 'How about the race track?' does not charge *bribery* and official corruption[11].

"The reason is that in each of these charges an essential element of the offense is lacking."

At page 27 Judge Yankwich states:

"In Grand v. Dreyfus supra the supreme court held that the word 'take' could not by innuendo be construed to mean steal. See also Goldstein v. Foss, 4 Bing. 489, 13 Eng. C. L. Rep. 601, Commonwealth v. Szliakys, 150 N. E. 190."

On page 24 of his work Judge Yankwich adopts the remark of Lord MacNaghten in *Neville v. Fine Art & General Insurance Co.,* L. R. (1897) App. Cas. 68, as follows:

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5. Sweaas v. Evenson, 110 Minn. 304.
6. Mellen v. The Times-Mirror Co., 167 Cal. 587.
7. Vellikanje v. Millichamp, 67 Wash. 138; Stockley v. Clement, 4 Bing. 162, 13 Eng. C. L. Rep. 440.
8. Diener v. Star-Chronicle Pub. Co., 232 Mo. 416.
9. Pittsburg Railway Co. v. McCurdy, 114 Penn. St. Rep. 554.
10. Johnson v. Brown, et al., 13 W. Va. 71.
11. Warner v. Baker, 36 App. D. C. 493.

> " 'Because some persons may choose, not by reason of the language itself but by reason of some fact to which it refers, to draw an unfavorable inference, it does not follow that therefore such matter is libelous'."

On page 29, Judge Yankwich, referring to "several important principles in the law of libel" says:

> "Among them is the principle that in determining whether a publication is libelous the publication must be considered as a whole. The 'bane' and the 'antidote' must be taken together."

On page 78 of the brief reference is had to *Browne v. Prudden-Winslow Co.,* 186 N. Y. Supp. 350, 195 App. Div. 419. There an employer said of a former employee that he had been repeatedly and wilfully dishonest in his transactions. It was held that the charge of dishonesty was nondefamatory because, construed in its context, it meant only the abuse of the relation between employer and employee in attempting to divert business to a rival concern, and it did not impute embezzlement or larceny.

III.

EVIDENCE WAS ERRONEOUSLY ADMITTED CONCERNING EFFORTS OF THE PLAINTIFF TO FIND EMPLOYMENT.

This is the fourth ground upon which appellant submits that the judgment should be reversed.

A. Assignments of error Involved:

XXVI. (R. 44)

> "The Court erred in permitting the plaintiff Harry J. Gray to testify in response to a certain question over the objection and exception of the defendant as follows:
>
> 'Mr. Van Dyke: Q. Now, Mr. Gray, after you left Swift & Company's place of business, after this last

conversation, what did you do with regard to seeking employment?

'Mr. Harrison: Now, this, I presume is offered for the purpose of showing a transaction between this witness and other persons with whom he sought employment. We object to that testimony on the ground that it is wholly incompetent, irrelevant and immaterial; it is not shown to have any connection with the alleged slanderous statements until proof is offered by these other persons the statement was made. It is hearsay testimony and has no connection with the slander charged in the complaint.

'The Court: Overruled.

'Mr. Harrison: Exception.

'A. I went to Virden Packing Company and asked for employment. That is the first place I went to.' "

XLVI. (R. 59)

"The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning plaintiff's endeavors to obtain employment, as follows:

'Q. Who was the first meat company you applied to for employment?

'Mr. Harrison: That is objected to, if the Court please, on the ground that it is irrelevant, incompetent and immaterial and has no connection with the slander charged. Now, there is no showing here and no showing has been attempted to be made that any disparaging remarks of any kind or character were made to any other employers. Counsel now is going into the question of what other employers may have done, and that will obviously open a very wide scope of inquiry.

'The Court: Overruled.

'Mr. Harrison: Exception.

'(Witness) I first applied for employment at the Virden Packing Company at its Offices in South San Francisco, and I talked with the Sales Manager, whose name I don't recall.' "

XLVII. (R. 60)

"The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning plaintiff's endeavors to obtain employment, as follows:

'Q. What was the conversation you had with the sales manager of the Virden Packing Company?

'Mr. Harrison: That is objected to as hearsay, incompetent, irrelevant and immaterial.

'The Court: Overruled. Exception.

'Mr. Harrison: Exception.

'(Witness) He told me to drop back in a day or two and he then told me that he had nothing for me.' "

XLVIII. (R. 61)

"The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning plaintiff's endeavors to obtain employment, as follows:

'Q. Give us the conversation you had with that man at Cudahy's?

'Mr. Harrison: Same objection, if the Court please, irrelevant, incompetent, immaterial and hearsay.

'The Court: Overruled. Exception.

'Mr. Harrison: Exception.

'A. I told him the experience that I had; that I wanted to stay in the meat business; that I was willing and had an education and quite a foundation in the meat business; that I thought I could do them some good. He was very much interested in it. I dropped back in several days and spoke to him again and he said that he didn't have anything for me.' "

XLIX. (R. 61)

"The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning plaintiff's endeavors to obtain employment, as follows:

'Q. Give the conversation you had with the sales manager of Hormel Packing Company?

'Mr. Harrison: We object upon the same ground.

'The Court: Yes, overruled. Exception.

'Mr. Harrison: Exception.

'A. I told him about the same as I had told the other concerns, and he asked me to take this application and fill it out and he would talk to me, or I could just talk to the general manager when I came back. I filled out the application and came back and talked to either the sales manager or the general manager, either one of the two. On the first occasion, I don't remember whether it was the sales manager; it was one or the other; I talked to both men. I asked the second man if I should leave my application blank that I had filled out, and he said, "No, I'm afraid we haven't any place for you".' "

L. (R. 62)

"The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning plaintiff's endeavors to obtain employment, as follows:

'Q. What happened there? Give the conversation you had with those people at Hickman Products Company.

'Mr. Harrison: My objection goes to this conversation, too, if the Court please.

'The Court: Yes, overruled. Exception.

'Mr. Harrison: Exception.

'(Witness) I told him my experience down the Peninsula, that I had been running a truck similar to the one that they had down there. I came back later and he said that they had nothing for me.' "

LI. (R. 63)

"The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning plaintiff's endeavors to obtain employment, as follows:

'Q. Give the conversation at Zee and Zoe.

'Mr. Harrison: We object to the conversation on the grounds already stated.

'The Court: Overruled. Exception.

'Mr. Harrison: Exception.

'(Witness) He told me he was considering three men, of whom I was one. He also asked me to come back the following day, and he would give me his answer. I came back the following day, but he said, "I am sorry, Mr. Gray; we have given the job to someone else".' "

LII. (R. 63)

"The Court erred in permitting the plaintiff Harry J. Gray to testify over the objection and exception of defendant concerning the plaintiff's endeavors to obtain employment, as follows:

'Q. Did you get employment at either Cudahy Packing Company or Houser Packing Company in Los Angeles?

'Mr. Harrison: Object to that on the ground that it is immaterial, remote and having no connection with the slander complained of.

'The Court: Overruled.

'Mr. Harrison: Exception.

'A. No, sir. I did not get employment after I left San Francisco until June, 1935'."

B. Discussion.

The error in each of the above assignments is the same.

In his complaint plaintiff sought special damages for alleged inability to obtain employment in San Francisco or in the County of San Mateo (Par. III of the Complaint, R. 3). The trial court permitted the plaintiff to introduce evidence of efforts to obtain employment, although no evidence was offered to connect his failure to obtain employment with the alleged slander; there was no evidence that any of the remarks complained of were ever made to any of the parties from whom he sought employment, and no evidence was even offered to show that the parties from whom he sought employment had ever heard of the alleged slander.

After leaving the employment of the defendant in October, 1934, the plaintiff sought employment elsewhere from several different companies. The evidence to which we objected has to do with his efforts to obtain employment from Virden Packing Company in South San Francisco (Assignment No. XXVI, R. 44; No. XLVI, R. 59; No. XLVII, R. 60); with the Cudahy Packing Company (Assignment No. XLVIII, R. 61); with Hormel Packing Company (Assignment No. XLIX, R. 61); with Hickman Products Company (Assignment No. L, R. 62); with Zee and Zoe Company (Assignment LI, R. 63) and even with the Cudahy Packing Company and Houser Packing Company in Los Angeles (Assignment LII, R. 63).

With respect to each of these companies the plaintiff was permitted to testify, over repeated objection, that he asked for employment, speaking to the general manager or sales manager; that these parties were first interested, requested him to call again, or asked him to fill out applications, and that when he called again they had nothing for him (R. 114-18).

This was the plaintiff's only evidence as to special damages. We think it obvious that it was error to admit the evidence.

As to efforts to obtain employment from Cudahy Packing Company and Houser Packing Company in Los Angeles (Assignment LII), the error is clear, because the complaint asks special damages only for failure to obtain employment in San Francisco and in San Mateo County. Special damages are recoverable only if pleaded.

> "Thus, a plaintiff may recover for the loss of his employment as the result of defamation by defendant if he alleges the same as special damage in his petition, but not otherwise." (17 *R. C. L.* p. 431, Sec. 190)
>
> "When certain special damages are alleged plaintiff cannot introduce evidence of other special damages not alleged." (37 *Corpus Juris* 61, Sec. 432)

For a broader reason the error of the trial court is clear as to all evidence relative to attempts to obtain employment. There

could be no possible inference of causal connection between the alleged slander and failure to obtain work. The plaintiff did not show or seek to show that any defamatory utterances had ever been made by the defendant or by anyone on its behalf to any of these companies of whom employment was sought, nor even that remarks which had been made to customers of Swift had ever been retailed or repeated so as to reach the ears of these other companies.

In *Newbold v. The J. M. Bradstreet Co.,* 57 Md. 38, 40 Am. Rep. 426, the court said:

> "Where the alleged libel is only actionable in respect to special damages it must appear to be of a character that the special damage alleged may be the natural and proximate, though not the necessary, consequence of the publication. 2 Greenl. Ev., §420; Townsh. Sl. & Libel, §197, and notes to that section. The special damage must be proved as laid, and any substantial variance between the allegation and proof will be fatal. It must also appear to be the natural and immediate consequence of the defendant's wrongful act; and if the special damage is alleged to consist in the refusal of a third person to deal with the plaintiff, or to give him credit, or in the action of any third person in enforcing obligations, evidence is not admissible of the declarations of such third person as to his reason or motive for so acting; the third person himself must be called to prove his motive; for the act without the reason or motive therefor is no evidence against the defendant. *Tilk v. Parsons,* 2 C. & P. 201; *Tunnicliffe v. Moss,* 2 C. & K. 83; *Dixon v. Smith,* 5 H. & N. 450; *Dicken v. Shepherd,* 22 Md. 415; 2 *Stark. on Sl. & Lib.* 57, 58.
>
> "Now in this case the alleged libel not being actionable *per se,* but only in respect to the special damage alleged, it is quite clear, upon the principles we have just stated, that the offers of proof of special damage, contained in the ninth and tenth exceptions, were not admissible, and therefore properly excluded. *There is no evidence whatever to show any connection between the acts of the parties named in those exceptions and the alleged libel, or that they ever saw it, or knew of its existence. Such evidence could fur-*

nish nothing more than a foundation for a mere conjecture as to the reasons upon which the parties acted." (p. 429.)

Harbinson and Gould did not speak to the Virden, Cudahy, Hormel, Hickman, Zee & Zoe or Houser companies, nor were their utterances ever retailed by others to those companies. The error of the trial court is more grievous when it is recalled that even if these utterances had been retailed so as to reach these companies, Swift could not be held responsible. A defendant is not liable for the unauthorized repetition of a slander by those to whom it was uttered.

Maytag v. Cummins, 260 Fed. 74, (C. C. A. 8th); *Carpenter v. Ashley,* 148 Cal. 422, 83 Pac. 444; *Turner v. Hearst,* 115 Cal. 394, 47 Pac. 129; *Burt v. Advertisers Newspaper Company,* 154 Mass. 238, 247; 28 N. E. 1, 6 (per Holmes, J.).

Maytag v. Cummins, supra, contains a thorough discussion of the subject. The first two headnotes summarize its conclusions:

> "Voluntary and unauthorized repetitions of a slander by third persons, current rumors and reports thereof and damages flowing therefrom, are not regarded by law as the natural or probable consequences of the original utterance of the slander."
>
> "The legal presumption is that a slander will not be repeated, and that its unauthorized repetition and current rumors and reports of it and the damages therefrom are not to be anticipated by the originator, and are not the natural or probable consequences thereof, but the proximate cause of such damages is the illegal intervening repetition or the making by third persons of the current reports and rumors."

The *Maytag* case expressly notes that the rule is fully established in California (260 Fed. at 82).

Newell on Slander & Libel, 3rd Ed., Sec. 257, p. 300, states:

> "It is too well settled to be now questioned that one who utters a slander is not responsible, either as on a distinct cause of action or by way of aggravation of damages of

> the original slander, for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control, and who thereby make themselves liable to the person slandered; and that such repetition cannot be considered in law a necessary, natural and probable consequence of the original slander."

Turner v. Hearst, 115 Cal. 394, at 400, refers to this kind of evidence in slander cases as "pernicious". The *Maytag* decision expresses the same view. Indeed, there the trial court after admitting evidence of the type in question struck it out on motion at the end of the trial. The Circuit Court of Appeals nevertheless held that the evil of admitting the evidence had been accomplished and therefore ordered a reversal.

It said:

> "Such matters tend to draw the attention of the jury away from a consideration of the real issues to a contemplation of other questions, and unconsciously to lead them to render their verdict on the real issues in accordance with their views upon false issues. Knickerbocker Trust Co. v. Evans, 188 Fed. 549, 566, 567, 110 C. C. A. 347. Trials of actions for slander and libel are peculiarly susceptible to evil influences from irrelevant and immaterial matters, as are all actions which excite unusual personal feeling or public interest, so that it is peculiarly desirable that such matters should not creep into the evidence in cases of this character." (p. 83.)

The evil of admitting the evidence in the present case is doubly apparent when we note the instructions given by the court to the jury. The court gave the following instruction (R. 182):

> "If you find for the plaintiff you must award him damages. *You must award special damages in such sum as will compensate him for any loss of income from employment if you find from the evidence that he was unable, for any period of time, to obtain employment by reason of the alleged acts of the defendant, as set forth in the complaint.*

> The evidence shows that special damages, if any, have been proved only *to the extent of $750.* In addition to special damages, if any, which you may award, you may, if you find for the plaintiff, award him such general damages as will compensate him for all the detriment proximately caused to him by the acts of the defendant as alleged in the complaint. Special damages may not exceed $750, and general damages may not exceed $50,000."

The jury was thus told that plaintiff was entitled to special damages to compensate him for any loss of income from employment, if it found from the evidence that he was unable for any period of time to obtain employment by reason of the alleged slander of the defendant, and the sum of $750 was placed in the jury's mind as an appropriate figure for special damages. Inasmuch as the verdict of the jury was for $1750, it is a reasonable inference that the jury awarded the exact sum of $750 as special damages. The instruction of the court, in referring to evidence of inability "to obtain employment by reason of the alleged acts of the defendant" necessarily referred to the very evidence to which we objected, because there was no other evidence to which it could apply. As an abstract proposition the instruction is unobjectionable; the harm done by it had its roots in the admission of the evidence.

Unquestionably the error in admitting the evidence prejudiced the defendant with respect to the extent of damages awarded. And we think that the injurious effects of the error were even more extensive. Juries in slander cases are affected by many factors not logically relevant. While there is no logical connection between plaintiff's failure to obtain employment and any utterances which were made concerning him, it is impossible to know to what extent this evidence may have prejudiced the jury against the defendant on the main issue of liability or no liability. See quotation from *Maytag v. Cummins,* supra, page 23.

We submit that the judgment must be reversed because of the admission of this evidence, if for no other reason.

No. 8843

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SWIFT AND COMPANY (a corporation),
Appellant,

vs.

HARRY J. GRAY,
Appellee.

BRIEF FOR APPELLEE.

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No. 8843

IN THE

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BRIEF FOR APPELLEE.

Contained in the Appellant's statement of the case, in its opening brief, is a subdivision entitled, "Statement of the Facts". This statement of facts is in the main correct. We would observe, however, that it contains a number of conclusions of the Appellant which are not statements of fact.

This case on its facts is rather simple. The Plaintiff had been employed by Swift and Company for some time, and when the events with which this case is concerned occurred was performing the duties of a driver of one of Appellant's trucks, selling produce from the truck.

Although there was a Company rule that such drivers were to turn in their cash, sales slips and

collection books at the end of each day's work to the cashier, Plaintiff did not observe this rule, for the reason that as to him the rule was unworkable, for proper facilities were not afforded so he could adhere to it.

When Plaintiff would return at the end of his day's labors, the cashier was seldom, if ever, present and no acquittal of responsibility for his collections and records could be obtained by him. He, therefore, for some time had been used to taking the collections and records home, in order not to leave them unattended for any greater length of time than necessary. He customarily went back on his run in the morning a short time before the cashier appeared, but would put the envelope containing the money and records over the partition and within the cashier's locked cage, where the cashier would receive them when he came on the work, and later the cashier would give plaintiff the customary receipt.

This practice had been followed some six or seven months before the events happened with which this case is concerned. (R. 76, 159 and 160.)

On Saturday morning, October 13, 1934, Gray placed in the cashier's cage his collection book and an envelope containing his collections and sales slips for the previous day. (R. 76.)

That afternoon, when he had returned from his morning run, the cashier asked him where his Friday's collections were, saying he had not received them. A search was thereupon instituted, but did not disclose the missing articles.

Since Plaintiff was about to go on vacation for two weeks, and not wishing to disrupt his plans, he made out from memory for his superior, Mr. Everett, who was acting then as head of the sales department, a list of customers whom he had sold to, the amount of their purchases and payments, and proceeded on his vacation.

It was while he was gone that the slanderous utterances were spoken concerning him.

His place was taken on his route by Harbinson, and Everett gave to Harbinson the list prepared by Plaintiff, instructing him to make a check-up from the list, and Harbinson, while engaged in doing that, made the statements concerning Plaintiff which are set forth in Appellant's statement of the facts.

While Harbinson was so engaged, and before he had completed his check-up, Mr. Hartl sent another employee, Mr. Gould, out, who took over the work of checking, and Mr. Gould likewise made slanderous statements during the time he was engaged in that work.

The statements made are so clearly slanderous, if false, that little need be said upon that point.

When Plaintiff came back from his vacation, expecting to go back on his job (R. 80), he was informed by Harbinson that he was to report at the office on Monday morning. He was there received by White, the general manager; Kelly, the sales manager; Everett, the assistant sales manager; and Hamilton, the cashier, and then was directly accused by Hartl, who said: "Gray, besides that money that

was missing the day you left and knew about, we have some twenty or twenty-one other tickets that date as far back as three weeks before you left that have never been turned in. We have it in black and white against you". (R. 81.)

White asked him what he had to say about it. Plaintiff assured them he had been honest. Kelly then took over, and accused Gray of "a buildup for something bigger", and Gray retorted, "You must be crazy, that is just a case of the number not being torn off where the paper was perforated".

They then told him that he had been suspended; that either he make up the deficit, or they would turn him in to the bonding company. (R. 81.)

Gray asked for a chance to prove his innocence, and the reply from Hartl was that they had it in black and white and had it cold. (R. 82.)

Gray asked to look at the files and show them they were wrong. They claimed they had already looked the files over and found all the evidence they wanted, and that Gray could not find anything that would do him any good. He, nevertheless, continued to plead for a right to look through the records. He finally obtained that privilege (R. 82) and went down the Peninsula to see what information he could find to help him clear himself.

When he returned, Hartl demanded that he make out a check for what they claimed he had not turned in. He protested it would be admitting guilt, and was met by the threat that if he did not write out the

check he would be blacklisted with the bonding companies and could not get a job anywhere. (R. 83.)

Under that bludgeoning Plaintiff made out his check, on which he later stopped payment when he was out from under their domination.

He was then told that he was fired (R. 83) and protested that he could convince White that there was a guilty man in their midst somewhere. White asked him who it was and he replied, "It is Jack Hamilton, the cashier". White's response was that he would not even listen to his story as Hamilton was a trusted employee of eighteen years standing.

Plaintiff again asked for a sales job, and was refused. (R. 84.)

In April of 1935, at which time Plaintiff was in Los Angeles, Plaintiff learned, from reading in the paper, that Jack Hamilton, the cashier, was in trouble. (R. 118.) Plaintiff wrote a letter to White (R. 127), stating his understanding that Hamilton's books were under rigid investigation, and requesting the privilege, at his own expense, of coming up and helping to ferret out the truth, asking of White only two things, that right down in his heart White believe him innocent and that now he would listen to his story concerning Hamilton.

White replied (R. 126) that he was surprised at Gray's attempting to reopen the incident as he was under the impression that the Company had satisfied Gray of the fact that he was innocent of any attempt to defraud the Company, and had merely been care-

less in the handling of his accounts. Even at the trial Defendant, through counsel, took the position that Plaintiff made no claim of embezzlement. (R. 113.)

Plaintiff did come to San Francisco and talk with Hartl. (R. 119.) Plaintiff told Hartl he had interviewed Hamilton and accused him point blank of having framed Plaintiff; that Hamilton would not admit it, and said there was no trouble between himself and Swift and Company.

Plaintiff asked Hartl to return the money he had paid them and Hartl refused, unless Hamilton would admit he was the one who stole it. (R. 119.)

Plaintiff was next referred to the Company's attorney, Mr. Smart, who, in turn, referred him to Hamilton's attorney, this resulting in a visit to Hamilton in the Redwood City jail. Plaintiff got nowhere and that was the last time he saw Swift and Company. (R. 121.)

We suggest, in passing, that there can be no doubt, and that there was none in the mind of the jury who tried this case, that notwithstanding, after the Hamilton affair came along, the Company then felt that Plaintiff had not been guilty of failing to turn in money, yet when Harbinson and Gould were sent down to make their check-up, the officials of the Company, from top to bottom, so far as the San Francisco management was concerned, were generally of the belief that Plaintiff was an embezzler, feeling that so firmly that they were willing to

bludgeon out of him what they assumed he had taken by threatening to blacklist him with the bonding company.

Everyone knows that such a blacklisting would definitely write finis to the career of anybody who ever expected to occupy a position of trust with any employer.

ARGUMENT.

I.

THE UTTERANCES COMPLAINED OF WERE NOT PRIVILEGED.

Appellant's claim that these utterances were privileged is based upon a claim that they were made within the protection of subdivision 3 of Section 47 of the California Civil Code, that is, they were made by a person interested to one who was also interested and who requested the information.

We think it easy to demonstrate by a consideration of the situation shown by the statement of facts that this claim of privilege is wholly without merit. Plaintiff had made certain sales to and certain collections from a number of customers. His record of those transactions was missing, but there was not then, and there never was at any time, even an intimation that any charge by Swift and Company was to be made against the customers, themselves, that they had not paid the funds, or that any obligation of theirs to Swift and Company was being, or could be, called into question.

Plaintiff knew every customer he had sold to on that day, as to which the records were missing. He even knew the approximate, or, in fact, we may almost say, the actual amounts, of those sales. He made up a list for the Company of the sales and of the amounts, and nowhere has it been shown, or even intimated, that the Company was, as to these collections for sales made, making any claim against the customers. It was purely an intra-company matter.

Plaintiff was a member of the sales department. It was for the sales department to turn over to the auditing department the usual accountings that were required, based upon certain records required to be kept. Because in this instance these records were missing, the sales department was not in position to do that. They wanted, therefore, to complete their records as nearly as the same could be done, and for that reason the list was made out and the sales department undertook to check it in the field.

These things being so, the customers who were to be asked concerning the sales made to them on that day, and the collections made from them, had no interest whatsoever in the check-up. They, themselves, held sales slips given them, the duplicates of which were missing, and those sales slips showed what payments had been made and constituted a complete record, so far as the customers were concerned, given them by the Company, itself, bearing the Company's authorized representative's signature, so that from the customer's standpoint there was neither danger of lia-

bility, in excess of their actual liability, nor need of further records. From that angle, also, then, it may be said that these customers were in nowise interested in the Company's check-up.

Therefore, since the customers were not interested the Code section itself defeats Appellant's claim of privilege.

The point so much stressed in Appellant's brief, that the customers in many instances asked why Harbinson and Gould wanted to see the customers' tags, is entirely pointless, for the mere request for information does not create a privileged occasion. To do that the request must be from one who is interested in the transaction.

We think we may, in our turn, cite authorities which Appellant has itself cited in support of its own position. Take, for instance, the case of *Massee v. Williams,* 207 Fed. 222, cited on page 26 of Appellant's brief, wherein the Court defined a privileged communication as comprehending all bona fide statements in the performance of any duty, whether legal, moral or social.

Clearly, the acts here complained of, the slander here committed, fall entirely without the bounds of that definition of privilege. There was no bona fide statement made. The statement was false, now admitted to have been false. It was not in the performance of any duty, either legal, moral or social.

All that these men need have said in response to the customers' queries as to why they wanted to see the

customers' tags was that the records of the Company were missing.

The Court in the above cited case, further defining a privileged communication, stated it was one made on an occasion which furnished a *prima facie* legal excuse for the making of it, and we submit that definition cannot be fitted to the circumstances here involved.

Again, take the definition of privilege found in *Corpus Juris,* and cited on page 26 of Appellant's brief, which is that such a communication is one made in good faith to another, in order to protect his own interest, or to protect the corresponding interest of another, in a matter in which both are concerned.

These statements were not made to protect the interests of the customers, for they had none that needed protection. Nor were they made in a matter with which the customers were concerned, for they had no concern whatsoever in the matter of whether or not Swift and Company's records were missing in its transactions with them, nor as to whether Swift and Company's money had not been turned in. They, themselves, possessed, and, indeed, were at that moment being asked for the privilege of inspection of, records given them by Swift and Company, rendering them entirely disinterested as to whether or not Swift and Company had duplicates thereof, or had received the moneys these records showed Swift and Company's employee had received from the customers.

Not only had these customers paid, to their own knowledge, these sums, but they had Swift and Com-

pany's undisputed acknowledgment that they had so paid, and it was this very acknowledgment that Swift and Company wanted to see, not because they questioned these documents or had ever pretended that they did, but solely because from them they wanted to complete their own records for their own sales and auditing departments.

Appellant takes issue with this analysis of the facts, as, indeed, it must. It says, "It was, as a matter of business sense, important for Swift to ascertain the facts."

That may be granted, but when they go further, as they must, and say it was equally desirable for the customers that Swift's records properly reflect payments made, they go beyond a rational statement of the situation.

Certainly, there was no social interest of the customers in the records of Swift and Company, no moral issues were involved so far as the customers were concerned; and a clearer case could not be made where there was no legal interest on the part of the customers, since they, themselves, possessed complete and accurate records.

The foregoing discussion, we submit, clearly distinguishes from the present situation such cases as *McLaughlin v. Standard Accident Ins. Co.,* and *Warner v. Missouri Pacific Railway Co.,* relied on in Appellant's brief.

On page 35 of its brief, Appellant takes the position that the question of the existence of privilege

was one for the Court, and supports that claim with citation of authorities.

With this contention we agree. Such was the contention of Appellant at the trial of the case, when over and over again this matter of privilege was argued to the trial Court. Everything said here was likewise said to the trial Court, and abundant argument and citation of authorities, pro and con, were submitted, Appellant contending throughout, as it here contends, that it was for the Court to rule upon the question of privilege. With this contention the trial Court agreed.

This disposes of the question of whether or not there was actual malice, whether or not any corporation can be held for actual malice of its employees, and whether or not the Court erred in failing to give instructions upon the matters of privilege and malice.

No malice was charged in the complaint, nor was sought to be proven at the trial, referring now to that actual malice which will warrant the giving of exemplary damages, and without the pleading and the proof of which exemplary damages cannot be recovered.

As said in *Davis v. Hearst,* 160 Cal. 143:

> "Malice in fact is only material in libel as establishing a right to recover exemplary damages, or to defeat defendants' plea that a publication is privileged."

It is strange that since Appellee made no contentions concerning malice, and offered no proof thereof,

and since Appellant insists that the question of privilege was here one for the Court, with which insistence we agree, that it would still be claiming the Court erred in failing to give instructions on this question of privilege, and the further question of malice. Appellant succeeded in convincing the trial Court that the question of privilege was one entirely for the Court to determine, and therefore is in no position to complain that instructions upon the subject were not given.

On this question of privilege, Appellant finally complains of the giving of two instructions requested by Plaintiff: The first one, that a man intends the natural consequences of his acts; and the other, that in an action for slander the law implies some damage from the uttering of actionable words.

Neither of these instructions mentions malice; they are the usual instructions in cases of tort.

II.

APPELLANT'S EMPLOYEES WERE ACTING IN THE COURSE AND SCOPE OF THEIR EMPLOYMENT IN MAKING THE ALLEGED UTTERANCES.

Appellant's argument here falls into two divisions: First, with respect to Harbinson; and, second, with respect to Gould.

Taking up Harbinson first in our reply, we note that Appellant's argument runs that Harbinson was sent out by Everett, the assistant sales manager, who,

in the absence of Kelly, the actual sales manager, was acting as sales manager. The Company, they say, had given definite instructions to the sales department that when discrepancies or shortages occurred on a route, the sales department had nothing to do with the matter, and such matters were to be referred at once to the auditing department, which immediately took charge. They then conclude that there was no evidence at all that Mr. Everett had any authority in the premises when he sent Harbinson out.

We think that here Appellant chooses to ignore the facts. It is beyond dispute that the sales department, of which Mr. Everett was, during the period in question, the acting head, was concerned with the matter of furnishing to the auditing department proper reports of sales. Therefore, when Everett sent Harbinson out to check the list he had been given by Gray, he was acting for his own department in procuring proper records which they would then furnish to the auditing department. The situation is clearly not covered by the stated instructions.

If it be conceded that the sales department had nothing to do with discrepancies or shortages occurring on a route, still they would have the obligation to furnish records of sales. That department's own records of these particular sales were missing, but duplicates thereof were in the hands of the customers, and it was clearly within the interest of that sales department, and within the confines of the rule or the instructions as stated, that the sales department

complete its records of these sales. That matter is distinct from one of investigating the actuality of shortages and discrepancies, with which the instructions referred to were concerned.

Clearly here the jury had full right and authority to hold, as inferentially it did, that when Everett sent Harbinson out for these records, both Everett and Harbinson were acting within the scope of their employment.

Now, turning to the matter of Gould's authority, Appellant's argument runs that Gould did have authority to check the route for the purpose of ascertaining what moneys had been collected by Gray, but that he had no duty to ascertain the reason for the shortages. Appellant says Gould was authorized merely to take a list of numbers of missing tickets and to find the tickets that bore those numbers. That was, they say, the extent of his duty.

Even if the duties of Gould can be said to be so severely limited, nevertheless those duties alone were broad enough to make his acts in making the slanderous statements he did make clearly within the scope of his authority.

Of course, in discussing scope of authority in a matter of slander, it is never necessary to prove that the responsible superior expressly directed the agent to make slanderous statements at any time. The question is: Were those statements made while in the very act of doing that which the agent had authority to do?

If these slanderous utterances were made while the agent was in the actual performance of his duties touching the matter in question, then the superior is responsible.

In 5 *Thomp. Corp.*, 2d Ed., p. 5441, the rule is stated as follows:

> "The general rule makes the corporation liable for a slander uttered by its agent, while acting within the scope of his employment and in the actual performance of the duties thereof touching the matter in question."
>
> "It is well established that a corporation may be liable for a slander uttered by its agent, and according to the weight of authority it is liable where the slander is uttered by its agent within the scope of his employment and in the performance of his duties in the course of transacting the business of the corporation. The rule governing liability in cases of libel and of slander being regarded as the same, it is not essential to the liability of a corporation that the slanderous words were spoken with its knowledge and approval, or that it ratified the act of its agent or servant."
>
> 14a *Corpus Juris* 779.

In support of the foregoing, Corpus Juris quotes from the case of *Fensky v. Maryland Casualty Co.*, 174 S. W. 416, as follows:

> "There can be no sound reason for saying that a corporation may be liable for libel (a doctrine long recognized) and yet not liable for slander—unwritten libel or defamation of character. Under the modern rule, the corporate shell will not

shield the corporation from the ill effects of the slanderous tongue of its agent, if at the time the agent was transacting for the corporation the business of the corporation, and the slander was uttered in the course of such business—and in connection therewith. As an individual, I cannot go to another individual to adjust an account with him, and in the course of so doing publicly denounce him as a thief. Nor should a corporation, through its agents, be able to thus denounce a citizen, and escape liability."

In *Hypes v. Southern Railway Company,* 21 L. R. A. (N. S.) 873, in a case where a division superintendent uttered slander while examining the time account of an engineer, charging him with stealing from the Company, the Court held that under such circumstances the slander was committed within the course and scope of the agent's employment. The Court said:

"A corporation is liable for slander spoken by its agent while acting within the scope of his employment, and in the actual performance of the duties of the corporation touching the matter in question, although it did not appear that the slanderous words were uttered and published with the knowledge, approval, consent, or ratification of the corporation."

In *Courtney v. American Railway Express Co.,* 24 A. L. R. 128, the following language was used:

"After much discussion and great divergence of opinion, it may be regarded as settled by practical unanimity of text-writers and decided cases, that slander is in the same category with all other

> malicious torts, and that a corporation may be liable for it as well as for any of the others, under like circumstances. * * * A corporation is liable for slander of one of its employees by another in reference to a matter growing out of such contract relation, the matter being one within the duty of the slandering employee to adjust, whether the corporation subsequently ratified the slanderous act of its employee or not. * * * In order to hold the master liable for the tort of his servant, the servant must have been at the time engaged in the discharge of duties intrusted to him in reference to the particular matter in hand, and acting within the apparent scope of his employment."

In the case last quoted from, an engineer at the end of the month had turned in his time report, showing the number of hours he had worked during the month. His claim was disallowed to the extent of $37.00. Upon this matter there was an interview between the engineer and the superintendent, who, during that interview, in the presence of outsiders, called the engineer a thief.

These facts were held to show that the agent was there acting within the scope of his employment.

We think we need not go further with citation of authorities upon this matter. Both Harbinson and Gould, as we have heretofore said, were sent out to check the list of customers to whom the Plaintiff had sold goods. At the time they uttered the slanderous words, they were in the very act of doing that work, and clearly were acting within the actual, as well as the apparent, scope of their authority.

Of course, appellant did not show the Company ratified, approved, consented to or expressly directed the making of these slanderous statements, but under the rule that is not necessary. Probably, there was never a case where a corporation expressly ordered an employee to slander another. Nevertheless, these two men were acting within the scope of their authority and uttered these words in the very act of carrying out their work for their superior. Under such circumstances, the corporation is liable.

In closing this part of its brief, Appellant declares that the Appellee is impaled upon the horns of a dilemma, between privilege and authority.

They say that if the statements complained of are so connected with the task of checking the route as to be within the course and scope of the duties of the employees, they were then such a natural part of the task as to be protected by privilege.

In so stating, we submit that Appellant has overlooked a vital element of the defense of privilege, to-wit, that the person to whom the communication is made must himself, or herself, have an interest in the communication.

We are unable to see any dilemma in the case.

III.

THE WORDS UTTERED WERE BOTH FALSE AND DEFAMATORY.

Appellant requested the Court to instruct the jury that the words uttered were not reasonably capable of being understood to mean that plaintiff had been guilty of embezzlement.

Upon this matter, we submit that a reading of the language used in the light of everyday experience and common understanding is a sufficient refutation of this claim.

To charge that an employee is short in his accounts with his employer; that he has been taking his employer's money; and that he has collected money of the employer and has not turned it in, is to charge him with embezzlement.

If authority is needed for so plain a proposition, we refer to *Ecuyer v. New York Life Insurance Co.,* 172 Pac. 359, wherein it was held that statements that the plaintiff "was short in his accounts"; that, in substance, he "had received cash for premiums and did not turn the money in to the Company, nor report it"; that there was "a shortage in his accounts", were slanderous *per se.*

However, we do not think that Appellant's contention here under discussion is advanced seriously. To say that an employee, charged with handling moneys of his employer, and, of course, as a corollary, under the necessity to account for it and turn it in, has been or is short in his accounts; that he has taken his employer's money; that he has collected his em-

ployer's money and has not turned it in, and then to say that such statements do not charge him with having embezzled the funds, is to run counter to the common everyday understanding of such words. In fact, to say that a man is short in his accounts is the usual and ordinary way in which a charge of embezzlement is made. It is never necessary to prove such a charge was made in language sufficient to answer the technical requirements of a criminal pleading. If the words used make the charge in language ordinarily understood to have that effect, then the slander is made out.

In proving such a slander it is not necessary to prove the use of the exact words charged, provided that the proof does contain the sting of the charge. 16 *Cal. Juris.* 98.

In this case, however, the proof corresponded, for all practical purposes, exactly with the charge. Plaintiff proved that Harbinson said "Mr. Gray was short in his accounts with the Company." (R. 88 and 89.) That he was "short in his accounts" and "did not turn in his money". (R. 90 and 91.) That "he had not turned in his money to Swift and Company". (R. 91.) That he was "short in his accounts and had not turned the money into Swift and Company." (R. 92 and 93.) That he had been "accused of taking money from Swift." (R. 101.) That he "was short in his accounts". (R. 105 and 106.) That he "had taken some of Swift's money just before he went on his vacation and they wanted to see just how much he had taken". (R. 103.)

Every single allegation of the complaint as to slanderous utterances was proven, and most of them proven over and over again.

Appellant likewise contends in this division of its brief that as a matter of law the statements made were true. In so doing, Appellant ignores the justified and amply supported finding of the jury that it was not true that Gray had failed to turn in his money. Under the circumstances shown it was clearly for the jury to determine whether or not Gray had turned in his money and with it turned in his records of sales and collections. There was the testimony of Gray that he had done so, and the only answer which Appellant really makes is that he had violated a rule as to the manner in which he had turned the money and records in, and not that he had not, in fact, turned them in.

It is significant that despite Mr. Gray's testimony that he had turned his moneys and records into Mr. Hamilton in the same manner in which he had been turning them in for six or seven months, that the Appellant made no effort whatsoever to produce Mr. Hamilton, the cashier, to deny the testimony of Gray. Neither did it make any showing that Mr. Hamilton was not available. As a matter of fact, although it pleaded the truth of the charge, it made no showing in support of that plea whatsoever, except the highly technical implication that it again seeks to draw after a jury has passed upon the issue, to-wit, that Mr. Gray was short in his accounts and had not turned his money in, merely because he had, so the Appellant

says, violated a rule as to the manner in which that was to be done; not that he had not done the thing, but that he had not done it in a certain manner. That is all that this contention of the Appellant amounts to.

The letter of Mr. White, the Coast manager for the Appellant, is significant upon this matter. When Appellee, having heard rumors that Hamilton, the cashier, and his books, were under rigid investigation, wrote to Appellant, pleading for another opportunity of proving his innocence, and that he be granted an audience wherein his story concerning Hamilton would be at least listened to, the Appellant, through Mr. White, stated that it was under the impression that it had satisfied Mr. Gray "of the fact that you were innocent of any attempt to defraud the company".

When this investigation was under way, as has been shown by evidence heretofore referred to herein, such was not the attitude and belief of the Appellant. Had such been their attitude and belief, it is unthinkable that they would have threatened and coerced Appellee into repaying what they claimed he had taken, even to the point of threatening to blacklist him with the bonding companies.

We feel that this Court will readily understand the force of that threat and the utterly disastrous consequences to the Appellee had that threat been carried out.

It appears in the record that the Appellee had made special educational preparation for the sole purpose of becoming identified with the Appellant's institution; that he was on the way to accomplishing that

laudable ambition; and anyone having even the slightest acquaintance with the work-a-day business world, knows these things—that almost without exception, and particularly in large institutions, all employees who in the performance of their duties may have any opportunity of defrauding their employer or injuring him by dishonest acts, to say nothing of an opportunity to take money, are bonded. We venture to say that literally thousands of employees of Swift and Company are so bonded. Further, that bonding companies religiously keep detailed records of all persons, once bonded, who have been charged with dishonesty, and if those companies believe the charge is justified that they will thereafter refuse to again bond such person. Further, that such information is cleared through to all bonding companies. To be placed on the bonding companies' blacklists is to be foreclosed of all reasonable hope of again obtaining employment in a position usually bonded.

Also, when Appellant was making these investigations, we venture to say there was no doubt in the minds of its officers, when they accused Mr. Gray of being short, and we submit there is no doubt that any person to whom such a statement about Appellant was made would understand quite well just what was meant, to-wit, that he had been guilty of embezzlement.

We submit that the words uttered were false and as a matter of law were defamatory.

IV.

EVIDENCE CONCERNING EFFORTS OF PLAINTIFF TO FIND EMPLOYMENT WAS PROPERLY ADMITTED.

This matter is treated in the appendix to Appellant's brief.

Appellee was permitted to testify that after his having been slandered, and after his subsequent discharge by Appellant, he sought employment, particularly with firms and corporations engaged in the same business in the same territory as Appellant.

It was natural that he should do this, for, as he had said in his previous testimony, it was his ambition to carve out a business career in the meat packing industry, and it was in that industry that he possessed training and experience.

It appeared that Appellee first turned to the meat companies operating down the Peninsula, where he had gotten his first experience and where he knew most of the managers of the different stores and markets. (R. 114.)

He went first to Virden Packing Company and talked with the sales manager, who told him to drop back in a day or two, and then, when he did, told him he had nothing for him. (R. 115.)

Next, he went to Cudahy Packing Company. He said he told them of his experience in the business and that he wanted to stay in the meat business. They were much interested, but when Gray went back a few days later they told him they had nothing for him.

Next, he went to Hormel Packing Company, making the same statements as to Cudahy, filled out an

application, then came back and asked if he should leave his blank and was told they were afraid they had no place for him.

He went then to Hickman Products Company, told them of his experience, and came back later and was told they had nothing for him.

He went then to a Zellerbach subsidiary and was told that he was one of three who were being considered, and was asked to come back the following day, and was then told that they had given the job to someone else.

These things happened just after the slander had been committed. The slander had been widespread in a sales territory in which all these concerns were daily transacting a similar business.

Now, as a practical matter, it is almost always impossible for one who has been slandered, as was the Appellee, to prove directly that he has failed to obtain employment by reason of that slander, because such direct proof must necessarily be from the lips of those who have refused to employ him for that very reason. They simply will not tell. And we know as a practical matter again, and the law is and ever should be practical, that where the breath of scandal has touched one seeking employment in a matter germane to that employment, employers will not bother to investigate and determine the truth or falsity of such charges, but will immediately refuse employment and thereafter refuse resolutely to ever admit that they so refused because of the slander of which they had heard.

We submit that under the circumstances proof that immediately after a widespread slander in a sales community, application is made to many employers daily transacting business in that particular trade area, and where that application is received without any statement that there is no employment to be had, and after a few days, a period fitted to the usual investigation always made by the personnel departments of these great institutions of business, have elapsed and the answer invariably is that there is nothing to be had, is, first, the best proof which the nature of the case will ordinarily afford; and, second, affords justifiable inference by a jury that the failure to obtain employment was caused by the slander.

We say this, that in the ordinary course and conduct of business, where these employers knew that Gray had been calling upon the customers in this restricted trade area in which they, themselves, were dealing, they would unquestionably, in their ordinary investigation of the fitness of the applicant for employment in that trade area, make contacts through that area concerning his standing and acquaintance with the trade, and so doing would learn of this widespread slander, which, traveling with the accustomed speed of lies, would have spread throughout the area involved.

We submit that to say these things are not so is to make the law close its eyes and its ears and shut its mind.

CONCLUSION.

This case was most thoroughly tried in the Court below, to a jury composed of mature and widely experienced men of business, drawn from that world. For four days they listened to evidence, which was followed by thorough argument. It was their considered verdict that Appellee had been slandered, and that he was entitled to have it so declared. The award they gave was meager, but with it we have no quarrel, for with that award went the much more valuable result, that is, the clearing of the name of this young man from the disastrous charge of dishonesty in business and faithlessness in trust.

We submit that nothing that has been shown here would justify a reversal of that verdict.

Dated, Sacramento, California,
September 30, 1938.

Respectfully submitted,
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Attorneys for Appellee.

No. 8843

United States Circuit Court of Appeals

For the Ninth Circuit

SWIFT AND COMPANY, a Corporation,
Appellant,

vs.

HARRY J. GRAY,
Appellee.

REPLY BRIEF FOR APPELLANT.

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REPLY BRIEF FOR APPELLANT.

REPLY TO APPELLEE'S STATEMENT OF FACTS.

Appellee concedes the correctness of our statement of facts "in the main," but points out no error therein, and then launches into irrelevant and emotional discussion of events occurring *after* the alleged utterances of which complaint is made (Appellee's Br. pp. 1-7). These utterances complained of are remarks supposedly made by Harbinson and Gould on October 15, 16 and 17, 1934. But appellee's discussion (Br. pp. 3-7) has to do with occurrences between Gray, on the one hand, and Mr. White, Swift's General Manager, Mr. Hartl, its Auditor, and Mr. Kelly, its Sales Manager, subsequent to Gray's return from his vacation, on October 29 and 30. Appellee says that on these days—October 29 and 30—Messrs. Hartl, White and Kelly called him in and made accusing statements to him.

Not only is appellee's discussion immaterial, but it is contrary to the facts. It is based on scattered fragments of testimony of Gray but ignores Gray's own admissions on cross-examination. On cross-examination he admitted that

> "*Mr. Hartl never said to me that I had stolen any money;* what he said was that I was suspended from the company; that he had wired to Chicago and that I was suspended, and *that I was short,* and my accounts came to some $150, and it was up to me to make it up. *He did not say I had stolen any money; he said my accounts did not balance, that I was short.*" (R. 125, 126)

This Court has recently said, in *National Labor Relations Board v. Union Pacific Stages,* — F.(2d)—, (No. 8489, Sep. 23, 1938) that direct examination must be read in the light of cross-examination and that to arrive at a finding without doing so is to go beyond the record. Indeed, Gray's direct examination, as quoted in his brief, shows that there was no accusation of crime but merely statements that moneys and records were missing, that he was careless, and that he so understood what was said.

Moreover, these fragments of Gray's testimony on direct examination were contradicted by the other witnesses. Without minute discussion, we refer to the record, pages 163-5, 168-171. It cannot be said that the conflict has been resolved in favor of the plaintiff by the jury verdict. A verdict has the effect of resolving conflicts only where the particular question of fact is in issue and where the issue is presented to the jury. The remarks of Swift's officers were not in issue. It is not claimed that those remarks are actionable. No issue concerning them was given to the jury to decide. The trial court instructed the jury, and properly so (*Biggs v. Atlantic Coast Line Railroad Co.,* 66 F.(2d) 87, C. C. A. 5th; *Prins v. Holland-North America Mortgage Co.,* 181 Pac. 680, 107 Wash. 206), that the utterances made by the officers of the corporation to each other or to plaintiff were not actionable because they could

not be considered as having been published by the corporation (R. 180).

The substance of the conversations between Gray and Swift's officers was merely that the money had not been received by Swift. There was no claim that he had taken it, it being only pointed out that salesmen were not relieved of responsibility until they had their receipt, and that Gray had been careless, as he admitted (see our Opening Brief, pp. 19-20).

Of other irrelevant discussion in appellee's brief we shall say even less. With respect to the claim that he was refused permission to examine Swift's records, the fact is, as Gray himself testified, that he was permitted without question to examine the records (R. 82, 167); that he later came back and asked permission to examine the records again, and that he was allowed again to examine them after only momentary delay (Gray's testimony, R. 113).

Much is said by appellee of being "blacklisted" with bonding companies and of being "coerced" into giving his check for the shortage. Employees are not bonded merely against dishonesty but also against any failure to account for moneys collected. The purpose of a bond is to protect the principal against the loss, whatever its cause. Swift was entitled to collect upon its bond if the shortage was permitted to continue; informing Gray that it would be necessary to refer to the bonding company was not coercion. The propriety of his paying the shortage though he were guilty of no crime was recognized by him. He himself testified, as did his witness Harbinson, that before going on his vacation he admitted that since the money was gone and he had no receipt to show for it, it was incumbent upon him to make it good, and that he offered to pay for the shortage when ascertained (See our Opening Brief, pp. 7-9).

Appellee's brief (p. 5) then goes into something even more irrelevant,—the matter of Jack Hamilton, which arose in the spring of 1935. The insinuation is that it was Hamilton who

embezzled the moneys in question. There is no evidence to support this claim. The difficulties in which Hamilton found himself in the spring of 1935 had to do with things not here involved (R. 165, 166). Plaintiff's testimony about the Hamilton matter was objected to by appellant and exceptions were preserved (R. 119-20); the matter was too unimportant, however, for us to discuss in our opening brief.

The claim that the plaintiff was "fired" (Appellee's Br. p. 5) was shown on his cross-examination to be untrue. He was taken off the sales force and offered a position in the plant (R. 123, 169), as his brief guardedly admits by saying that he was refused a sales job.

But enough of this. This is an action for slander based upon alleged utterances of Harbinson and Gould, to which all these matters are irrelevant.

We therefore turn to the question of whether there was any actionable slander for which Swift may be held responsible.

DISCUSSION.

I. The Utterances Complained of Were Made on a Privileged Occasion.

A. Appellee Concedes That the Words Were Uttered Without Malice, and That Whether the Occasion Was Privileged Is Purely a Question of Law.

Appellee's brief makes certain concessions which simplify the issues. It concedes

(1) that the question of the existence of privilege is for the court (Appellee's Brief, pp. 11-12); and

(2) that no actual malice was present in the case, i. e., that the words complained of were uttered without malice (Br. pp. 12-13).

It is therefore conceded that if the occasion was privileged, there was no actionable slander even if the words were false and defamatory, and that in determining whether the occasion was privileged, the verdict of the jury is without any bearing or influence. This Court is both permitted and required to decide that question upon its own unrestricted judgment.

B. The Occasion Was Privileged.

Appellee's reply to our claim of privilege is based upon a contention that the check of the route was being made only for the advantage of Swift and in no degree for the advantage of the customers. Our answer is two-fold: (1) Even if true, it would be immaterial; and (2) it is not true.

There is no requirement that, for the occasion to be privileged, the one to whom a communication is made should derive an advantage from it. What the law seeks to ascertain is whether the remark was thrown forth gratuitously at a time and place to which, in the ordinary conduct of affairs, it had no reasonable relation, or whether it was said on such an occasion as to make it appropriate for the one party to address the other on the general subject matter,—in short, whether the utterance was mere idle gossip-mongering or an incident of the transaction of business.

There is no requirement that the communication be made to protect the interests of the party spoken to, as appellee's brief (p. 10) assumes when it says, "These statements were not made to protect the interests of the customers * * *." It is enough if made "with a fair and reasonable purpose of protecting the interests of the person making them" (*Massee v. Williams,* 207 Fed. 222, 230, C. C. A. 6th), or "in order to protect his [the utterer's] own interests" (36 *Corpus Juris* 1262). There is nothing in *Civil Code, Section* 47, subdivision 3, to the effect that privilege requires the protection of the interests of the party to whom an utterance is made. The requirement is merely that he be "interested." To say that

he is "interested" is merely to say that he has a reasonable relationship to the general subject matter. His interest need only be such an interest as exists when the subject matter of the publication makes it "reasonably necessary under the circumstances to accomplish the purpose desired" (36 *Corpus Juris,* 1262). Here the customers had a close relationship to the subject of the checkup, since they were the only persons from whom the facts could be ascertained.

When the authorities speak of a communication being made in the performance of a "duty, whether legal, moral, or social, even though of imperfect obligation," the words "legal," "moral" or "social" are not used for purpose of limitation but, on the contrary, to show how extensive the concept of privilege is. As said in 26 *Cal. Law Rev.,* 226 at 228:

> "The breadth of this definition forbids any attempt to confine the privilege referred to within narrow limits."

Appellee's whole contention is that since the customers who had bought goods from Gray had receipts from him, they could not be forced to pay again and therefore were not concerned. Aside from the rule that receipts are not conclusive, it suffices to refer to *McLaughlin v. Standard Accident Ins. Company,* 15 Cal. App. (2d) 55, 59 Pac. (2d) 631, discussed in our opening brief at pages 29 and 30. There the customers had paid their insurance premiums, had their receipts, and could not be required to pay again. Paraphrasing the language applied by appellee's brief (p. 7) to our case,

> "there was not * * * even an intimation that any charge * * * was to be made against the customers, themselves, that they had not paid the premiums, or that any obligation of theirs to the insurance company was being, or could be, called into question."

Nevertheless, the occasion was held to be privileged.

Again, in *Flowers v. Smith,* 80 S. W. (2d) 392 (discussed in our opening brief, pp. 31-32) there was no advantage to

be derived from the communication by the party communicated with. The universal test is often stated in the following language quoted in the *Flowers* case and having its origin in *Toogood v. Spyring* (1834), 1 C. M. & R. 181 (Eng.):

> "If fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society."

That the communications in the present case were honestly made follows from the concession that they were made without malice. When appellee (Br. p. 9) says, "There was no bona fide statement made" because "the statement was false," he is in confusion. Falsity is immaterial if privilege exists; falsity does not prove or tend to prove lack of bona fides; lack of bona fides and malice are equivalents; lack of malice has been conceded.

Moreover, as noted at the beginning, appellee's assumption that the customers could obtain no advantage from a checkup and straightening out of the accounts is false. Having dealt with Swift, it was a matter of advantage to the customers that Swift's records reflect the true facts. It is not enough that the possession of signed receipts will ultimately protect a customer from liability for double payment of accounts. It is a matter of interest and advantage that the accounts be properly stated and mutually recognized. Moreover, when appellee says that the customers had receipts, he forgets that many of the sales made by Gray were not cash but credit sales. Two-thirds of his customers were credit customers (R. 121). The checkup that was made sought not only to find the cash tags but also the credit tags (R. 154). It was of interest to these customers that Swift know of their indebtedness to it. To claim otherwise is to ascribe dishonest purposes to them.

Appellee also claims (Br. pp. 9-10):

> "All that these men [Gould and Harbinson] need have said in response to the customer's queries as to why they

> wanted to see the customer's tags was that the records of the Company were missing."*

If this is the fact, it demonstrates that Gould and Harbinson were acting beyond their authority and therefore exonerates the defendant on the second ground discussed in our opening brief (Open. Br., pp. 52-71). At the same time it does not by any means affect the privilege. The law does not analyze a situation to determine objectively whether what was said went beyond the bare necessities, and it does not hold against the privileges if it concludes that less might have been said. The test is whether there was malice,—the state of mind of the utterer. As was pointed out in our opening brief (p. 39) quoting from *Davis v. Hearst,* 160 Cal. 143, 167, which in turn quotes *Odgers on Libel and Slander*:

> "Mere inadvertence or forgetfulness, or careless blundering is no evidence of malice. Nor is negligence or want of sound judgment."

In the leading case of *Gattis v. Kilgo,* 128 N. C. 402, 38 S. E. 931, 935, the court said, in the course of a thorough analysis, quoting *Odgers*:

> "The tendency of the courts is not to give the language of privileged communications too strict a scrutiny. 'To hold all excess beyond the absolute exigency of the occasion to be evidence of malice, would, in effect, greatly limit, if not altogether defeat, that protection which the law throws over privileged communications'."

Bared to its essentials, the case is this:

There was a nexus between Swift and its customers, a natural relationship, which attached a privilege to the occasion. There was a propriety in Swift's desire to check the route, and a naturalness and reasonableness in communicating to the customers, who were not strangers to the situation. If such an

*This is all that Gould testified he did say (Our Op. Br., p. 17).

occasion is not privileged, then every business concern in a like situation is to be paralyzed by fear of unforeseeable consequences from ascertaining facts on the knowledge of which alone the conduct of the business may rationally proceed.

II. Appellant's Employees Were Not Acting in the Course or Scope of Their Employment in Making the Alleged Utterances.

A. Swift Is Not Responsible for Any Remarks of Harbison.

We deny that Harbinson was sent out by Mr. Everett, assistant sales manager, to check the route. We assert further that even if he was sent out by Mr. Everett, the latter had no authority in the premises and therefore Harbinson had none.

The appellee concedes that the sales department had no authority and nothing at all to do with the matter of discrepancies, shortages, checking or accounting (Br., p. 14). But then, in order to bring within the scope of Everett's authority his assumed directions to Harbinson to check the route, appellee argues that the "sales department" had the duty of furnishing the auditing department with proper reports of sales (Br., p. 14) and that in having the route checked, Everett was seeking to obtain proper reports to supply to the auditing department.

To admit in one breath that the sales department had nothing to do with discrepancies or with checking and to claim in the next that the sales department as such had the duty of furnishing records to the auditing department, is to deny what is just affirmed.

There is no evidence to support the suggestion that the sales department had any duty to furnish to the auditing department sales reports. The undisputed evidence is that it did not have any such duty.

Swift's salesmen not only had sales functions but also functions of collecting and accounting. But the duty owed by the truck driver to the sales department was merely to sell, whereas the duty to collect and report was owed to the auditing department.

The duty of keeping and turning over records of collections and credit sales was not the duty of the sales department *but the personal duty of the truck driver.* If he failed in that duty, which he owed to the auditing department, *it was the function of the auditing department to gather the information and complete its records. The sales department had no duty or power in the premises at all.*

Truck drivers did not hand over their records to any superior in the sales department to be in turn handed over by the sales superior to the auditor. The records went directly from the salesmen to the auditing department (See our Op. Br. pp. 4-5), and no sales superior made reports to the auditing department. If the sales department had any duty of completing sales records and supplying them to the auditing department where a truck driver had been remiss or careless in his duty, the act of the auditing department in making its own check, as it here did by sending out Charles Gould, would be futile duplication.

There can be no inference that it is the duty of a sales department, i. e., the sales manager or assistant sales manager, to supply records to the auditing department. Some companies may follow such a practice; others do not. Swift did not. Indeed, the more normal situation is that the sales manager and sales department are interested only in promoting sales. Collections and records fall within the auditing department. If a truck driver has combined functions, he is a representative of both departments, *pro tanto.* This was Swift's system. The whole situation was summed up in the uncontradicted testimony of Mr. Everett as follows:

> "The other reason was that there are definite instructions in Swift and Company to their sales department, that when

discrepancies or shortages, or anything of that nature, occur on the route, the sales department has positively nothing to do with it, *that man automatically comes under the jurisdiction of the plant auditor and* the only part we play is replacing the man on the route. The plant auditor tells us that he is going to take the man off the route and we have nothing to do except to replace him with a suitable man." (R. 146)

* * * * * * *

"In case a discrepancy occurs *of this character,* the matter of checking up on the discrepancy falls within the jurisdiction of the auditor's department and not that of the sales manager's department." (R. 147)

The appellee did not ask any witness a single question concerning any supposed function or duty of the sales department to complete and turn over sales records to the auditing department. Appellant did question the assistant sales manager, Mr. Everett, the auditor, Mr. Hartl, and the general manager, Mr. White, concerning the authority of the sales department and the auditing department; it was obvious that their testimony was directed to the entire subject. If the appellee at that time felt that there was some distinction between a duty to check discrepancies and a duty to check in order to complete sales reports, it was for him to explore the subject by cross-examination. The burden of proving authority in Harbinson was on the appellee. But he made no effort whatever to go into the subject or to support his burden; his counsel asked no questions of any witness concerning the matter. It is too late on appeal to supply missing proof by unfounded inferences.

A review of what was done is illuminating. Swift did employ a device for the purpose of keeping a record of all sales. That device, the "checkerboard" system, was entirely within the auditing department (R. 162). Even if we accept the plaintiff's version that Harbinson was sent out by Everett, Harbinson was *not* sent out to complete records to be turned over to the

auditing department. The plaintiff's story is that, since he desired to go on his vacation, he told Mr. Everett that he was prepared to have Harbinson sent out to ascertain what the shortages were so that the moneys due Gray could be applied against the shortage. In other words, the purpose of a check through Harbinson, according to plaintiff's own version, was to permit an adjustment of the discrepancies between the salesman and the company (See our Opening Brief, pp. 7 to 10). It is not claimed that Harbinson was asked by Mr. Everett to find and make copies of missing sales tickets and to turn them in, and Harbinson did not make copies of any such tickets or turn any records in. Consequently, even if there were some duty on the sales department to complete and turn over records to the auditing department, Harbinson was not engaged in carrying out such duty. The task of checking missing sales tickets, making copies and bringing copies back was not undertaken until Hartl, the auditor, sent out Gould to do the work.

We submit that Harbinson was not acting within the scope of his employment.

B. Swift Is Not Responsible for Any Supposed Utterances of Gould.

We now turn to Gould, bearing in mind that if Gould lacked authority to make the alleged remarks, Harbinson was without such authority for the same reason, in addition to the reasons peculiar to himself.

As to Gould our point is that while he had authority to check the route, he went beyond the scope of his authority if and when he made the alleged utterances.

Appellee does not meet the issue. The issue is the scope of Gould's authority, but appellee discusses an entirely different matter. The gist of appellee's argument is that a corporation may be liable for slanderous remarks of an employee in the

same circumstances wherein it would be responsible for libelous statements by him, and that it is not necessary to prove that the superior expressly directed the slanderous statements or ratified them. In other words, appellee contends for the majority rule. Now, in our opening brief, after pointing out the majority and the minority rules (Open. Br. p. 54), we proceeded to discuss the subject upon the express assumption that the majority rule will be applied (Br. p. 55). We showed that even under the majority rule Swift could not be held for the alleged remarks of Gould because Gould's utterances were not within the course or scope of his authority. To this, the heart of the issue, appellee's brief gives no reply or even consideration.

The very authorities cited by appellee show that under the majority rule it is not enough that the one making the utterances be an employee. The additional elements are variously stated, but a composite, compiled from appellee's own authorities, is helpful. The employee must have been acting (a) within the scope of his employment, (b) in the actual performance of his duties, and (c) in the course of transacting the business of the corporation (cf 5 *Thompson on Corporations* (2d ed.) p. 5441). The remarks must have been uttered (d) in the course of such business, (e) in the line of his employment, (f) *in connection therewith,* (g) *in connection with the very thing he was looking after for his corporation,* (h) in the actual performance of his duties, and (i) and *touching the matter in question,* i. e., the subject matter of his duties, the particular matter in hand (*Fensky v. Maryland Casualty Co.,* 174 S. W. 416, 264 Mo. 154, *Hypes v. Southern Ry. Co.,* 82 S. C. 315, 64 S. E. 395, 21 L. R. A. (N. S.) 873). (j) The matter must be one within the duty of the slandering employee to adjust (*Courtney v. American Railway Express Co.,* 120 S. C. 511, 113 S. E. 332, 24 A. L. R. 128).

The cases cited by appellee in no way support the view that Gould was acting within his authority when he made the alleged

remarks. In only one was there a trial of the facts, *Courtney v. American Railway Express Co., supra, and there a verdict in favor of the plaintiff was reversed upon the ground that a directed verdict should have been entered for the defendant.*

The three cases cited by appellee are further analyzed and discussed in an appendix to this brief, pages i to iii.

In addition to the cases cited in our opening brief, we cite *National Packing Co. v. Boullion,* 151 S. W. 244, 105 Ark. 326. There it was held that a corporation was not liable for a slanderous accusation of forgery and larceny made by an auditor investigating accounts of a shipping clerk showing a shortage; while it was the duty of the auditor to investigate shortages, gather evidence showing who was responsible, select his own methods and use his own judgment in making the investigations, he did not have authority to accuse anyone of a crime in connection with the defalcation and he was not authorized to make charges of a criminal nature against anyone.

We submit that under the facts of this case neither Harbinson nor Gould was acting within the course or scope of his employment in making the alleged remarks.

III. The Words Uttered and Supposed to Have Been Uttered by Harbinson and Gould Are Both True and as a Matter of Law Nondefamatory.

On this subject appellee (Br. p. 20) cites *Ecuyer v. New York Life Ins. Co.,* 172 Pac. 359, 101 Wash. 247. We are grateful, because its holding is the exact opposite of what appellee attributes to it. The words, which appellee states the *Ecuyer* case held to be slanderous, were expressly held to be not slanderous and to be true under facts essentially identical with those of the present case. There the plaintiff, Harry Ecuyer, was employed as a clerk of the defendant with the duty of receiving premium payments. Certain receipts for

premiums had been given by him, but he had turned in neither money nor record. Utterances to four people were proved, to the plaintiff's father, to one from whom plaintiff, after discharge by defendant, sought employment, and to the cashiers of two other branches of the defendant. To the father the following statement had been made:

> " 'Harry is short in his money. * * * He has been using the company's money. * * * Harry is short in his accounts. * * He has been taking the company's money. * * * Harry has stolen the money. * * * Harry has stolen the company's money. * * * What has Harry used this money for that he has taken?' " (172 Pac. 360, 361)

The court held that this statement was slanderous because it expressly and repeatedly charged the plaintiff with having stolen. But it added that if the statement had been confined to an expression that the son was short, it would not have been defamatory and it would have been true. It said (362):

> "They were direct, unequivocal, and repeated charges that appellant had stolen the money then missing and other unnamed sums. So far as the evidence shows, the whole truth was that the receipts showed that appellant had collected the money and his cashbook showed that he had not accounted for it. *Had the offending communication been confined to a statement of those facts, the evidence, which conclusively established their truth, would have made a complete defense.* But it was not so confined. He was charged with stealing the money." * * *
>
> "Had the charge been confined to the admitted facts, *with the legitimate deduction that he was short in his accounts,* we would be able to say as a matter of law that the communication was not in excess of the privilege." (363)

To the utterance to the father may be contrasted the statement to the prospective employer; the following words were uttered (361):

> "* * * that plaintiff had been at least careless in his work; that when he checked plaintiff there was an item of some $34, more or less, short, * * * that plaintiff * * * had left his keys in the cash drawer containing $200 or $300 in cash; that, if a man wanted to steal, that would be one way to do it. *He stated that plaintiff was short in his money; also, short in his accounts.* As a result of the talk, Ward did not employ plaintiff, advising him that he would not do so without a 'clean bill of health' from the New York Life Insurance Company."

The court held that these words were not slanderous and that they were true. It said (363):

> "*They stated the facts truthfully,* and said that appellant had been at least careless. *There is no evidence that they directly charged appellant with theft, or that the words used were designedly capable of that construction, however Ward may have construed them.*"

To the cashiers in the other branches the following or similar words were uttered (361):

> "*he was short in his accounts,* and in substance that he had received cash from premiums *and did not turn the money into the company,* nor report it."

These are the words appellee erroneously says the case held to be slanderous. In fact the court said that they fell in the same category as the words to the prospective employer.

> "The statement went no further than *that appellant was short in his accounts,* and that none of the clerks was charged with the theft." "It was confined to the exact truth." (363)

The *Ecuyer* case is thus complete support for our contention that each of the two statements,—that Gray was short and that he had not turned in moneys collected—was true and nondefamatory. We find nothing in appellee's brief contending that the first statement,—that Gray was short—was not true, and

if this one remark is true, a reversal necessarily must follow. (See discussion, our Opening Brief, pp. 74, 75.) Appellee does argue that the second statement,—that Gray had not turned in the money—is not true (Appellee's Brief, pp. 22-23), simply because of Gray's testimony that he had thrown the money into the cage. But the physical fact of tossing the money into the cage was not equivalent to turning the money into the company. The uncontradicted evidence is that no man was relieved of responsibility or considered discharged of his obligation with respect to collected moneys until he had obtained a receipt from some authorized representative of the company. To say of one that he had not turned in money is not equivalent to saying that he has kept it. The *Ecuyer* case, supra, shows that it is truthfully said of one who has not accounted for money to the proper officials that he has not turned it in, even though others may have purloined it and irrespective of the conclusion which may be drawn by the parties to whom the utterance is made. The fact that for a period of time Gray had fallen into the habit of ignoring the rule of the company requiring the delivery of money into the hands of the cashier, night order clerk or night watchman each night does not mean that he had "turned in" the money by tossing it into the cage.* In any event, a statement that he had failed

*As an excuse for violation of the rule, appellee now says that he did so "in order not to leave them [the collections] unattended for any greater length of time than necessary." (Appellee's Brief, p. 2.) In October 1934 the excuse which Gray gave was that when he came in from work he was too tired to complete his records. The explanation which he gave at the trial was that there was no one at the office at night who would give him a receipt. We so showed in our opening brief (p. 6) where we pointed out the weakness of the excuse in view of the fact that he still did not obtain a receipt when he tossed the moneys into the cage the next morning. The present explanation that he retained the collections over night for their greater safety is newly created, and it is equally weak. If he had turned in the collections at night, as required by rule, to the cashier, night order clerk or watchman, the moneys would have been placed in a strongbox (R. 158-160) instead of being kept under his bed or behind his bureau (R. 148).

to turn in money physically would not have been a charge of embezzlement and so would not have been defamatory.

As noted (Opening Brief, pp. 73, 74), there are three statements charged in the complaint. Appellee persists in treating the three statements as having been uttered as a single whole. This, of course, is in error (see our Opening Brief, p. 74), and the construction to be given the words, if a single utterance, does not concern us. The third alleged statement, that Gray had taken the company's money, was spoken to no one. This is conceded by the appellee when he argues that "in proving such a slander it is not necessary to prove the use of the exact words charged, provided the proof does contain the sting of the charge" (Br. p. 21), and reference is made to a supposed statement to one person that Gray "was accused" of taking money and to a supposed statement to another that "it seemed" he had taken money.* Assuming that if these words had been spoken, they may be taken as a substitute for the words charged, nevertheless they were denied, and there can be no inference that the jury decided they were spoken for reasons discussed in our opening brief (pp. 74, 75 and Appendix, p. 9). Nor, if spoken, were these words defamatory for reasons discussed in our Opening Brief (pp. 77-78 and Appendix pp. 12-15). No effort is made by appellee either to answer our discussion or to refer to it. Moreover, the rule concerning the "sting of the charge" will not permit the substitution of these words for those charged in the complaint. The rule concerning the "sting" is merely that if only a part of a charged utterance is defamatory, proof of the defamatory portion alone is sufficient. But

> "It is unavailing that the evidence shows the utterance of language from which the jury may find defendant in-

*Appellee's brief (p. 21), in quoting the latter remark, improperly omits the words "it seemed," thus changing the statement to a positive one. It also assigns this remark to Harbinson, whereas appellee's witness had in fact assigned this remark to Gould who denied it. (See our opening brief, p. 18.)

> tended to charge plaintiff with the slanderous accusation; the function of the jury is to determine whether defendant spoke the words alleged in the complaint. [Here a passage re 'sting'.] Equivalent words, or words of similar import, are insufficient, as are words that might produce a similar impression to that of those alleged." (16 *Cal. Jur.* Sec. 67, p. 98)

And see *Bell v. Kelly,* 82 Cal. App. 605, *Geo. Haub v. Freiermuth,* 1 Cal. App. 556, and *Fleet v. Tichenor,* 156 Cal. 343, where an allegation that the defendant had said of the plaintiff that she had entered the defendant's house and stolen jewelry was held not proved by showing an utterance that plaintiff had taken the jewelry.

Other things are said in appellee's brief (pp. 23-24) which are entirely immaterial as, for example, the reference to the attitude of Swift's officers. The utterances which appellee relies upon as constituting slander were those supposedly made by Harbinson and Gould, not statements of Swift's officers (see p. 1, supra). What was said by Swift's officers between themselves and to Gray in the bosom of the corporation, subsequent, as it was, to the remarks of Harbinson or Gould, neither explains nor could be reflected in anything that Harbinson or Gould theretofore had said. Indeed, Kelly was on a vacation at the time, Harbinson had never talked to White, Hartl or Kelly, and Gould had talked only to Hartl, and in that conversation, fully covered by the record, nothing was said condemnatory of Gray (R. 149, 150, 163).

It is not true that White, Hartl, or Kelly ever thought that Gray had stolen money. But even if they had, that is not the issue. The issue is whether Harbinson and Gould had said to customers that Gray was guilty of embezzlement. We submit that what they said does not have that meaning.

IV. Evidence Was Erroneously Admitted Concerning Efforts of Plaintiff to Find Employment.

This subject was discussed in our opening brief in an appendix (pp. 15-24) due to lack of space under Rule 24(e). For the same reason, we now place our reply in the appendix to this brief (pp. iv-v). Our failure to discuss the subject in the body of the briefs in no way lessens our reliance on it as ground for reversal. The matter goes, however, to the question of damages and not to that of liability, and we prefer in the space alloted to us in the body of the briefs to discuss liability.

CONCLUSION.

This is an action for slander, not an action for wounded feelings, injury to pride, or loss of employment. It is, moreover, an action against Swift and not one against Harbinson or Gould.

We submit that the judgment should be reversed with directions to enter judgment for the defendant.

Dated: San Francisco, California, October 8, 1938.

HERMAN PHLEGER,
MAURICE E. HARRISON,
T. L. SMART,
MOSES LASKY,
Attorneys for the Appellant, Swift and Company.

BROBECK, PHLEGER & HARRISON,
Of Counsel.

(APPENDIX FOLLOWS)

Appendix

I.

ANALYSIS AND DISCUSSION OF CASES REFERRED TO IN PART II, B, OF THE FOREGOING BRIEF, CONCERNING GOULD'S LACK OF AUTHORITY.

At page 14 of the foregoing brief we stated that we further analyze and discuss in the Appendix authorities cited by appellee. The discussion follows:

In *Courtney v. American Railway Express Co.,* 120 S. C. 511, 113 S. E. 332, 24 A. L. R. 128, the appellate court, as noted, held that a directed verdict should be entered for the defendant. While agreeing that a corporation may be liable for remarks of an employee in a proper case, the court adhered to the strict tests of the scope of an employee's employment. It approved two of the cases relied on by us in our opening brief, *Washington Gas Light Co. v. Lansden,* 172 U. S. 534, 43 L. ed. 543, 19 S. Ct. Rep. 296, and *Vowles v. Yakish,* 179 N. W. 117, 191 Ia. 368.

Both of the other cases cited by appellee, *Fensky v. Maryland Casualty Co.,* 174 S. W. 416, and *Hypes v. Southern Ry. Co.,* 82 S. C. 315, 64 S. E. 395, were decided on demurrer to the complaint. The basis of each demurrer was the contention that a corporation cannot be liable for slanderous statements of an agent and that there can be no agency to slander. In ruling against the demurrer the appellate court in each case merely enunciated the majority rule that a corporation may be liable for slander in a proper situation. In each case the allegations of the complaint were most extensive with respect to the agency. No question of proof was involved.

Thus, in the *Fensky* case the complaint alleged that the employee made the remarks as "agent of defendant, while

acting within the scope of his employment and in the actual performance of the duties touching the matter in question" and again, as "agent of said defendant, while acting within the scope of his employment and in the actual performance of duties assigned to him by this defendant." The facts alleged were that the plaintiff was an attorney, that he had been engaged in writing by one May to file an action for personal injuries against a party assured by the defendant, and that defendant's agent called upon plaintiff with May, who asserted that May had not signed the authorization to the plaintiff to act.

> "The facts [as alleged] show that this agent was looking after this claim against the defendant, and it of necessity required the agent to investigate the contract of plaintiff, which gave plaintiff an interest in the claim. Whatever was done and said was done and said in the very performance of the agent's duty to his master. In effect, when this agent approached plaintiff, the plaintiff not only asserted that there was a valid claim against the agent's principal, but further that, by reason of the contract, he (plaintiff) had a half interest in that claim. To this the agent in effect said: Yes, you claim under that contract, but that contract is a forgery, and you know it, and we have the man right here with us to prove that it is a forgery."

And since the matter was before it on demurrer, the court said that it was necessary to apply a liberal construction to the complaint in order to sustain it.

The facts of the *Hypes* case are those of which appellee's brief (p. 18) erroneously assigns to the *Courtney* case, except that the appellee leaves out the essential facts. There plaintiff was a locomotive engineer of the defendant and at the end of the month turned in his time report showing the number of hours he had worked during the month. His claim being disallowed by the defendant to the extent of $37, the plaintiff, after some correspondence, had an interview with the

superintendent of the railroad at division headquarters at which time they "took up the matter of plaintiff's unpaid time." The complaint alleged that the superintendent called plaintiff a "thief." It further alleged:

> " 'That the action of the said P. L. McManus in accusing plaintiff of "stealing" and of being a "thief" *was done within the scope of his authority, and in the discharge of his duties as superintendent as such; that he was acting for the Southern Railway Company and for its interests,* as indicated by his words, "I am going to stop you fellows from stealing from the company"; that the tort against the plaintiff was committed in the office of the said superintendent, while going over the books, considering the question of plaintiff's time, *which said P. L. McManus had full authority and power to settle'.*"

There was no issue of fact involved but only a matter of construing the complaint. The *Hypes* case, in fact, approves *Sawyer v. Norfolk & S. B. Co.,* 142 N. C. 1, 54 S. E. 793, and *International Text-Book Co. v. Heartt*, 136 Fed. 132, two cases which we cited in our opening brief as showing the limitations upon liability of a corporation for slander. As to the case before it, the court placed emphasis on the fact that the slander grew out of a "dispute as to the correctness of plaintiff's claim for wages, a matter within the duty of the agent to adjust." This factor is emphasized also in the *Courtney* case, in explaining the *Hypes* decision. By way of contrast, the *Courtney* decision notes that under its own facts the employee had merely uttered a personal opinion concerning a matter of accounts which he had no duty to settle. *Such is the case here.* Gould, while he had the authority to ascertain what customers had paid Gray, had no duty to ascertain the reasons for the shortages, to make adjustments, or express opinions.

II.

EVIDENCE WAS ERRONEOUSLY ADMITTED CONCERNING EFFORTS OF PLAINTIFF TO FIND EMPLOYMENT.

This is the fourth ground upon which appellant submits that the judgment should be reversed. It is noted on page 20 of the brief.

In our opening brief, we contended that it was prejudicial error to admit evidence of plaintiff's efforts to find employment, because (a) there is no evidence that any of the utterances were ever heard by those from whom employment was sought, and (b) a defendant cannot be held liable for unauthorized repetitions of a slander by those to whom uttered.

Our authorities are ignored by appellee, who cites none on his own behalf. Appellee's whole reply is an assertion that it ought to be supposed that he was unable to get employment by reason of the alleged utterances. Thus appellee claims (Br. p. 26) that "these things happened just after the slander had been committed. The slander had been widespread in a sales territory where all these concerns were daily transacting a similar business." But there is no evidence that these statements were widespread. There is evidence of remarks made to only eleven people (Opening Brief, p. 74), and no assumption that they were made to others is justified.

The logical inference from the proof is that Gray's inability to obtain employment was due to economic conditions. While he spent only two months in and about San Francisco seeking employment during which time he had one job, he then went to Los Angeles and there was unable to obtain employment for six months (R. 121); yet there is no claim that the alleged utterances had been spread in Los Angeles or contributed to his inability to obtain employment there.

Appellee further says that he ought not to be required to prove that his inability to obtain a job was due to the utterances, for the reason that the proof would have to come

from the lips of those who refused to employ him. But difficulty of proof does not dispense with proof. Moreover, Gray made no effort to call any of these men as witnesses. It may not be inferred that, if called, they would all have committed perjury. It may not be assumed without evidence (1) that these men heard the utterances, and (2) were motivated thereby. Appellee, it will be seen, is seeking to pyramid a supposition upon a supposition, for even if an inference were permissible that if these businessmen had heard the alleged utterances they would have for that reason refused employment to the plaintiff, there was still no evidence even offered that they had heard the utterances. Such evidence, if it existed, would not have to come solely from the lips of the prospective employers. Indeed, it is not claimed that Harbinson or Gould made any remarks to any of those to whom plaintiff applied for a position. The foundation of the second supposition is that these businessmen heard some repetition of the remarks through third parties not in the employ of Swift. But even if such an inference were possible, the rule of law is that a defendant may not be held liable for the effects of a repetition (See our opening brief, Appendix, p. 22).

We suggest that the appellee's comments on the speed with which lies are wont to travel, his comments on his youth, his endeavors to educate himself for a position with Swift, the setback to his career by reason of losing his job, etc., are just the material for an appeal to a jury's prejudice which the law seeks to eliminate in slander cases by the rules which we invoke.

No. 8846

United States

Circuit Court of Appeals

For the Ninth Circuit.

DOLLAR STEAMSHIP COMPANY, Claimant of, and the STEAMSHIP "PRESIDENT COOLIDGE" her engines, boilers, machinery, tackle, apparel and furniture,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court for the Territory of Hawaii.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 8846

United States

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For the Libellant, The United States of America:

INGRAM M. STAINBACK, Esq.,
United States Attorney,
Federal Building, Honolulu, T. H.

J. FRANK McLAUGHLIN, Esq.,
Assistant United States Attorney,
Federal Building, Honolulu, T. H.

For the Libellee, The Steamship "President Coolidge," her engines, boilers, machinery, tackle, apparel and furniture:

THOMPSON, WOOD & RUSSELL,
Inter-Island Building, Honolulu, T. H. [1*]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the United States District Court for the Territory of Hawaii.

Libel in Rem Admiralty No. 296.

THE UNITED STATES OF AMERICA,
Libellant,

vs.

THE STEAMSHIP "PRESIDENT COOLIDGE", her engines, boilers, machinery, tackle, apparel and furniture,
Libellee.

CLERK'S STATEMENT.

Time of Commencing Suit:
August 26, 1937—Libel filed.

Names of Original Parties:
The United States of America, Libellant.
The Steamship "President Coolidge", her engines, boilers, machinery, tackle, apparel and furniture, Libellee.

Date of Filing Pleadings:
August 26, 1937—Libel.
September 3, 1937—Claim.
October 26, 1937—Answer.

Date of Filing Decree:
March 21, 1938—Decree filed.

Times When Proceedings Were Had:
August 26, 1937—Re Order Fixing Amount of Bond.

February 15, 1938—Order Setting Case for Trial.

March 17, 1938—At Trial.

March 21, 1938—Allowing Costs. Decree. [2]

Proceedings in the Above Entitled Matter were had before the

Honorable Edward M. Watson, District Judge.

Dates of Filing Appeal Documents:

Notice of and Petition for Appeal—April 4, 1938.

Assignment of Errors—April 4, 1938.

Order Allowing Appeal—April 4, 1938.

Citation on Appeal Issued—April 4, 1938.

Praecipe—April 6, 1938.

CERTIFICATE OF CLERK AS TO THE ABOVE STATEMENT.

The United States of America,
Territory of Hawaii—ss:

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled cause; the names of the original parties, the several dates when the respective pleadings were filed; the time when proceedings were had and the name of the Judge presiding; the date of the filing of the decision and date when appeal documents were filed and issued in the above-entitled cause.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 16th day of May A. D. 1938.

[Seal] WM. F. THOMPSON, JR.,
Clerk, U. S. District Court, Territory of Hawaii.

[3]

[Title of District Court and Cause.]

LIBEL.

(Violation of Secs. 407, 411 & 412, Title 33, United States Code.) [4]

To the Honorable, the Presiding Judge of the above entitled Court:

This Libel of Information by Ingram M. Stainback, United States Attorney for the District of Hawaii, prosecuting for the said United States of America in this behalf, in the name and on behalf of the United States of America against the Steamship "President Coolidge", her engines, boilers, machinery, apparel and furniture, in a cause of seizure, alleges and informs as follows:

Article One

That said vessel is now lying in the Port of Honolulu, Territory of Hawaii, in public, navigable waters of the United States, within the admiralty and maritime jurisdiction of the United States, and of this Court.

Article Two

That said vessel on the 26th day of August, 1937, while in the navigable waters of the United States,

to-wit, Honolulu Harbor, Territory of Hawaii, was used and employed in violating the provisions of Section 407 of Title 33 of the United States Code in the following manner, to-wit: that during the forenoon of said date, at the place aforesaid, refuse matter, to-wit: garbage consisting of celery, oranges, tea leaves, etc., was thrown, discharged and deposited [5] from or out of said vessel into the navigable waters of the United States, to-wit: Honolulu Harbor, Territory of Hawaii.

Article Three

That by reason of the foregoing matter hereinbefore set forth in Article Two, a penalty of not to exceed Twenty-five Hundred Dollars ($2500.00), nor less than Five Hundred Dollars ($500.00) was incurred, said penalty becoming by virtue of Section 412, Title 33, United States Code, a lien upon and against the above named vessel.

Article Four

That all and singular the premises aforesaid are and were true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore, the said Ingram M. Stainback, United States Attorney for the District of Hawaii, on behalf of the United States, prays the usual process and monition against said vessel, the Steamship "President Coolidge", her engines, boilers, machinery, tackle, apparel and furniture, in this behalf to be made, and that all persons concerned in in-

terest in said vessel, her engines, boilers, machinery, tackle, apparel and furniture, may be cited to appear and answer the premises, and that this Honorable Court may be pleased to decree for the penalty aforesaid, and that said vessel may be condemned and sold to pay the penalty aforesaid, with costs, and for such other and further relief as shall to law and justice appertain.

Dated: Honolulu, T. H., this 26th day of August, 1937.

THE UNITED STATES OF AMERICA,
Libellant.

By (s) INGRAM M. STAINBACK,
United States Attorney, District of Hawaii.

[Endorsed]: Filed August 26, 1937. [6]

[Title of District Court.]

MONITION.

The President of the United States of America

To the Marshal of the United States of America for the Territory of Hawaii—Greeting:

Whereas, a Libel of Information hath been filed in the District Court of the United States for the Territory of Hawaii, on the 26th day of August, A. D. 1937, by Ingram M. Stainback, Esq., Attorney of the United States for the Territory of Hawaii, in the name and in behalf of the United States of America, against The Steamship "President Cool-

idge", her engines, boilers, machinery, tackle, apparel and furniture, for the reasons and causes in the said Libel of Information mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said Steamship "President Coolidge", her engines, boilers, machinery, tackle, apparel and furniture, may be cited in general and special, to answer the premises, and all proceedings being had that the said Steamship "President Coolidge", her engines, boilers, machinery, tackle, apparel and furniture, may for the causes in the said Libel of Information mentioned, be condemned and sold to pay the demands of the United States of America.

You Are Therefore Hereby Commanded to attach*ed* the said Steamship "President Coolidge", her engines, boilers, machinery, tackle, apparel and furniture, and to detain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel of Information, that they be and appear before the said Court, to be held in and for the Territory of Hawaii, on Friday the 3rd day of September, A. D. 1937, at 2 o'clock in the afternoon of the same day, if the same day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to

make their allegations on that behalf. And what you shall have done in the premises, do you then and there make return thereof, together with this writ.

Witness, the E. M. Watson, Judge of said Court, at the City of Honolulu, in the Territory of Hawaii, this 26th day of August, A. D. 1937, and of our Independence the one hundred and sixty-second.

WM. F. THOMPSON, JR.
Clerk.

By (s) E. LANGWITH
Deputy Clerk.

(s) INGRAM M. STAINBACK
U. S. Attorney, District of Hawaii. [7]

[Title of District Court.]

STIPULATION.

Entered into in pursuant to the Rules of Practice of this Court.

Whereas, a Libel was filed on the 26th day of August in the year of our Lord one thousand nine hundred thirty-seven by the United States of America, Libellant against the Steamship "President Coolidge," her engines, boilers, etc., for the reasons and causes in the said Libel mentioned; And whereas the Steamship "President Coolidge," her engines, etc., in the custody of the United States Marshal, under the process issued in pursuance of the prayer of said libel, and whereas the said Steam-

ship "President Coolidge," her engines, etc., has been claimed by K. A. Ahlin, as Master; And, whereas, it has been stipulated that said Steamship "President Coolidge," her engines, etc., may be released from arrest upon the giving and filing of an Admiralty Stipulation in the sum of One Thousand and No./100 Dollars, as appears from said stipulation now on file in said Court; And the parties hereto hereby consenting and agreeing that, in case of default or contumacy on the part of the claimant or their sureties, execution for the above amount may issue against their goods, chattels and lands:

Now, Therefore, the condition of this Stipulation is such, that if the Stipulators undersigned, shall at any time, upon the Interlocutory or final order or Decree of the said District Court, or of any Appellate Court to which the above named suit may proceed, and upon notice of such Order or Decree, to Frank [8] E. Thompson, Esquire, Proctor for the Claimant of said Steamship "President Coolidge," her engines, etc., abide by and pay the money awarded by the final Decree rendered by the Court of the Appellate Court if any appeal intervene,

then this Stipulation to be void, otherwise to remain in full force and virtue.

(s) K. A. AHLIN
As Master
UNITED STATES FIDELITY AND GUARANTY COMPANY
By (s) HERMAN LUIS (Seal)
Attorney in Fact.

Taken and acknowledged this 26th day of August, 1937, before me,
(s) WM. F. THOMPSON, JR.
Clerk, United States District Court. [9]

[Title of District Court and Cause.]

ORDER OF RELEASE.

To the United States Marshal, Hawaii:

You are hereby notified that pursuant to Section 941 R. S. U. S. a bond in the sum of $1,000.00 for the release of the above named vessel was on this day filed, and you are therefore directed to release the said vessel forthwith.

Dated: Honolulu, T. H., August 26th, 1937.
WM. F. THOMPSON, JR.,
Clerk.
By THOS. P. CUMMINS, (s)
Deputy Clerk. [10]

United States Marshal's Office
Marshal's Return.

The within Order of Release was received by me on the 26th day of August, A. D. 1937, and is re-

turned executed this 26th day of August, A. D. 1937 by releasing the S.S. "President Coolidge" her engines, tackle, apparel, etc.

(s) OTTO F. HEINE,
United States Marshal.

Dated at Honolulu, T. H., this 26th day of August, A. D. 1937.

Marshal's Civil Docket.
No. 2154.
Court No. 296.
Fees $2.00.
Expenses
Total $2.00.

[Endorsed]: Filed Aug. 27, 1937.

[Title of District Court and Cause.]

CLAIM OF AGENT ON BEHALF OF OWNER

To the Honorable, the Presiding Judge of the above entitled Court:

And now Stanley W. Good, intervening as agent for the interest of Dollar Steamship Lines Incorporated, Limited, a corporation, in the libel heretofore filed herein, appears before the Honorable Court, and makes claim to the said The Steamship "President Coolidge", her engines, boilers, machinery, Tackle, apparel and furniture, as the same were heretofore attached by the Marshal under process of this Court, and released upon the filing of a Stipulation entered into *in* pursuant to the Rules of Practice of this Court, upon the Libel of

information of The United States of America, Libellant, and the said Stanley W. Good avers that said The Steamship "President Coolidge", her engines, etc., were in possession of the said Dollar Steamship Lines Incorporated, Limited, at the time of the attachment thereof, and that the corporation above named was and now is the true and bona fide owner of the said The Steamship "President Coolidge", her engines, etc., and that no other person is the owner thereof; [12] and the said Stanley W. Good is the true and lawful bailee thereof as agent, wherefore he prays to defend accordingly.

Dated: Honolulu, T. H., this 3rd day of September, 1937.

(s) STANLEY W. GOOD
Agent for Dollar Steamship Lines
Incorporated, Limited, Claimant

THOMPSON, WOOD & RUSSELL
By (s) A. G. BOWMAN
Proctors for Claimant

The United States of America,
District of Hawaii.

Stanley W. Good, being duly sworn, deposes and says that he resides in Honolulu, City and County of Honolulu, Territory of Hawaii; that he is the agent of the Dollar Steamship Lines Incorporated, Limited, claimant above named; that the owner of said The Steamship "President Coolidge", her engines, etc., has its principal place of business in the City and County of San Francisco, State of California; that this deponent is duly authorized to put in this claim in behalf of the owner of the said The

Steamship "President Coolidge", her engines, etc., and that the said claim is true to the knowledge of this deponent, except as to the matters therein stated on information and belief, and as to such matters he believes it to be true.

(s) STANLEY W. GOOD

Subscribed and sworn to before me this 3rd day of September, 1937.

(s) RITCHIE G. ROSA
Notary Public, First Judicial Circuit
Territory of Hawaii

Due service by copy of the within Claim is hereby admitted.

(s) J. F. McLAUGHLIN
Ass't Attorney for Libellant
Honolulu, Hawaii

September 3rd, 1937.

[Endorsed]: Filed September 3, 1937. [13]

[Title of District Court and Cause.]

ANSWER

To the Honorable, the Presiding Judge of the above entitled Court:

The Answer of Dollar Steamship Lines, Inc., Ltd., a corporation, owner and claimant of The Steamship "President Coolidge", her engines, boilers, machinery, tackle, apparel and furniture as the same is proceeded against in the Libel of Information of the United States of America in an alleged cause of seizure, alleges as follows:

I.

Claimant admits that when the Libel was filed herein, the said The Steamship "President Coolidge" was in the port of Honolulu and within the jurisdiction of this Honorable Court as alleged in Article One of the Libel.

II.

Claimant denies allegations of Article Two of the Libel. [15]

III.

Claimant denies the allegations of Article Three of the Libel.

IV.

Claimant denies the allegations of Article Four of the Libel, except that claimant admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

V.

That all and singular the premises are true.

Wherefore, claimant prays that the Libel herein be dismissed with costs.

Dated: Honolulu, T. H., this 26th day of October, 1937.

DOLLAR STEAMSHIP LINES,
INC., LTD.
Claimant herein
THOMPSON, WOOD & RUSSELL
By (s) FRANK E. THOMPSON
Its Proctors [16]

The United States of America,
District of Hawaii—ss.

Frank E. Thompson, being first duly sworn on oath deposes and says:

That he is one of the Proctors for Dollar Steamship Lines, Inc., Ltd., owner and claimant of The Steamship "President Coolidge", her engines, boilers, machinery, tackle, apparel and furniture and as such makes this verification for it by its authority and on its behalf; that said owner and claimant has its principal place of business in the City and County of San Francisco, State of California; that the reason this verification is made by your affiant is that there is no officer of the owner and claimant within the jurisdiction of this Honorable Court, and your affiant has special knowledge of the facts upon which the foregoing Answer is based; that he has read said Answer, knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

(s) FRANK E. THOMPSON

Subscribed and sworn to before me this 26th day of October, 1937.

[Seal] (s) J. NOGUCHI
Notary Public, First Judicial Circuit,
Territory of Hawaii

Due service by copy of the within Answer is hereby admitted.

(s) J. F. McLAUGHLIN
Attorneys for *Asst. U. S. Atty.*
Honolulu, Hawaii

October 26, 1937.

[Endorsed]: Filed October 26, 1937. [17]

[Title of District Court and Cause.]

NOTICE OF TAKING DEPOSITION DE BENE ESSE.

To Ingram M. Stainback, United States Attorney, District of Hawaii:

Please take notice that Dollar Steamship Lines, Inc., Ltd., claimant herein, will take in the above-entitled action, to be used upon the trial thereof, the deposition of Dale E. Collins, master of the SS "President Harrison", before G. Frank Dougherty, a notary public duly commissioned and sworn, and qualified to act in and for the County of New York, State of New York, who is not of counsel or attorney for either of the parties to nor interested in this cause, or before some other officer authorized by law to take depositions, on the 13th day of January, 1938, at the hour of 10:00 o'clock in the forenoon of that day, and thereafter from day to day until the examination is completed, at the office of Thompson & Hunt, at 67 Broad Street in the City of New York, State of New York, [19] at which time and place you are hereby notified to appear and take such part in said examination as you may be advised, and as shall be fit and proper.

The ground for taking this deposition is that the said witness resides more than one hundred miles from the place of trial herein, as provided for by

Section 639 of Title 28, of the United States Code.

Dated: Honolulu, T. H., this 16th day of December, 1937.

THOMPSON, WOOD & RUSSELL,
(s) FRANK E. THOMPSON,
Proctors for Dollar Steamship Lines, Inc., Ltd., Claimant herein, Fifth Floor Inter-Island Bldg., Honolulu, T. H.

Service of the above notice admitted this 16th day of December, 1937.

(s) J. F. McLAUGHLIN,
Ass't United States Attorney, District of Hawaii.

[Endorsed]: Filed December 16, 1937. [20]

[Title of District Court and Cause.]

SPECIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CONFORMITY WITH ADMIRALTY RULE 46½.

This cause having come on regularly for trial before me upon the pleadings filed by the respective parties and the allegations and proofs on behalf of the parties having been heard and considered, now therefore, the court finds the facts as follows:

Special Findings of Fact.

(1) That the Steamship "President Coolidge" was on August 26, 1937 in Honolulu Harbor, Oahu, Territory of Hawaii.

(2) That the waters of said harbor are navigable waters of the United States.

(3) That on August 26, 1937, there was thrown from the Steamship "President Coolidge" into the navigable waters of said Honolulu Harbor garbage consisting in part of orange skins, celery, and tea leaves.

Conclusions of Law.

From the foregoing facts the Court concludes as a matter of law:

1. That the material thrown from the Steamship "President Coolidge" on August 26, 1937, into the waters of Honolulu Harbor was "refuse matter" within the meaning of 33 U. S. C. Section 407.

2. That at the time said refuse matter was thrown from said Steamship "President Coolidge" into Honolulu Harbor said vessel was [22] within the admiralty and maritime jurisdiction of this Court.

3. That when on August 26, 1937 said refuse matter was thrown from said vessel into the navigable waters of Honolulu Harbor, said vessel was a vessel "used or employed" in a violation of 33 U. S. C. Section 407 within the meaning of 33 U. S. C. Section 412 because 33 U. S. C. Sections 407, 411 and 412 must be construed together in terms of the remedy sought to be accomplished by said congressional enactments.

4. That the Steamship "President Coolidge" is therefore liable for a pecuniary penalty in accordance with the provisions of 33 U. S. C. Section 412.

A Decree in conformity herewith will be signed upon presentation.

Dated: Honolulu, T. H., this 21st day of March, 1938.

(s) EDWARD M. WATSON,
Judge, U. S. District Court for the Territory of Hawaii.

Receipt is hereby acknowledged of a copy of the within this 21st day of March, 1938.

THOMPSON, WOOD & RUSSELL,
By A. G. BOWMAN.

[Endorsed]: Filed March 21, 1938. [23]

In the United States District Court for the Territory of Hawaii.
October Term 1937.

Libel in rem Adm. No. 296

THE UNITED STATES OF AMERICA,
Libbellant,

vs.

THE STEAMSHIP "PRESIDENT COOLIDGE", her engines, boilers, machinery, tackle, apparel and furniture,
Libellee.

DECREE.

This cause having come on regularly for trial on March 17, 1938, before the Honorable Edward M. Watson, Judge of the above entitled court, upon the

pleadings filed by the respective parties and the allegations and proofs on behalf of the parties having been heard and considered, and the court having orally rendered its decision in this cause on March 17, 1938, and on the 21st day of March, 1938, in accordance with Admiralty Rule 46½, having filed its Special Findings of Fact and Conclusions of Law, now therefore, upon the motion of Ingram M. Stainback, United States Attorney, proctor for the libellant, it is hereby

Ordered, adjudged and decreed by the court that the libellant, the United States of America, recover from the libellee, The Steamship "President Coolidge", her engines, boilers, machinery, tackle, apparel and furniture, as a penalty, the sum of Five Hundred Dollars ($500.00), together with all costs of this suit, which are hereby taxed in the sum of Thirty-seven Dollars and Sixty-five Cents ($37.65);

And it appearing to the court that the libellee, The Steamship "President Coolidge", her engines, boilers, machinery, tackle, apparel, and furniture, has been released to the Dollar Steamship Lines, Inc., Limited, owner and claimant in this cause, upon a Stipulation for value in the sum of One Thousand Dollars ($1,000.), dated August 26, 1937, signed by K. A. Ahlin, Master of said vessel, on behalf of her owner and claimant, with the United States Fidelity and Guaranty Company, as surety, conditioned [25] that said principal and surety shall abide by and perform the decree of this court, it is hereby further

Ordered, adjudged and decreed that unless this decree shall be satisfied or proceedings thereon stayed by appeal, within ten (10) days after notice given by the proctor for the libellant to the proctors for the libellee and said claimant of the entry of this decree and the taxation of costs herein, the said surety, the United States Fidelity and Guaranty Company, shall cause the engagements of its Stipulation to be performed, or show cause within five (5) days after the expiration of said period of ten (10) days why execution should not issue against it, its lands, goods and chattels, according to said Stipulation to satisfy this decree.

Dated: Honolulu, T. H., March 21st, 1938.

(s) EDWARD M. WATSON,
Judge,
United States District Court for the
Territory of Hawaii.

Approved as to Form:

INGRAM M. STAINBACK,
United States Attorney, District of Hawaii.
By (s) J. FRANK McLAUGHLIN,
Asst. U. S. Attorney, District of Hawaii.
Proctor for Libellant.

(s) J. P. RUSSELL,
THOMPSON, WOOD & RUSSELL,
Proctors for Libellee & Claimant.

Receipt of a copy of the within is hereby acknowledged this 19th day of March, 1938.

THOMPSON, WOOD & RUSSELL,
By (s) A. G. BOWMAN.

[Endorsed]: Filed March 21, 1938. [26]

[Title of District Court and Cause.]

NOTICE OF FILING DECREE.

To: Thompson, Wood & Russell, proctors for the Libelee, the Steamship "President Coolidge" and for the Dollar Steamship Lines, Inc., Limited, claimant in the above entitled matter.

You will please take notice that on the 21st day of March, 1938, there was duly filed in the office of the Clerk of the United States District Court for the Territory of Hawaii in the above entitled matter a Decree, a true copy of which is hereto attached and made a part hereof.

Dated: Honolulu, T. H., the 21st day of March, 1938.

INGRAM M. STAINBACK
United States Attorney
District of Hawaii
By (s) J. FRANK McLAUGHLIN
Asst. United States Attorney
District of Hawaii.

Receipt is hereby acknowledged of a copy of the within this 22nd day of March, 1938.

THOMPSON, WOOD & RUSSELL
By (s) A. G. BOWMAN

[Endorsed]: Filed March 22, 1938 [28]

[Title of District Court and Cause.]

NOTICE OF AND MOTION FOR APPEAL.

To the Honorable, the Presiding Judge of the Above Entitled Court:

The Steamship "President Coolidge", libellee above named, and Dollar Steamship Lines, Inc., Ltd., claimant, conceiving themselves aggrieved by the decree in the above entitled cause entered on the 21st day of March, 1938, do hereby appeal from the said decree to the Circuit Court of Appeals for the Ninth Judicial Circuit of the United States of America, for the reasons set forth in the assignment of errors to be filed herein, and pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record of all proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Circuit Court of Appeals for the Ninth Judicial Circuit, for the United States of America.

Dated: Honolulu, T. H., this 1st day of April, 1938.

THE STEAMSHIP "PRESIDENT COOLIDGE", libelee, and Dollar Steamship Lines, Inc., Ltd., claimant,

By THOMPSON, WOOD & RUSSELL

(s) J. P. RUSSELL

Their Proctors.

Due service, by copy of the within Notice of and Petition for Appeal is hereby admitted.

(s) J. F. McLAUGHLIN
Asst. U. S. Atty.
Attorneys for.....
Honolulu, Hawaii
April 1, 1938.

[Endorsed]: Filed April 1, 1938. [30]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS.

Come now The Steamship "President Coolidge", libellee, and the Dollar Steamship Lines, Inc., Ltd., claimant in the above entitled cause and file the following assignment of errors upon which they will rely in the prosecution of the appeal herewith petitioned for from the decree of this court, entered on the 21st day of March, 1938.

Assignment No. 1.

The court erred in rendering a decree in favor of the libellant.

Assignment No. 2.

The court erred in overruling the oral motion to dismiss entered by the libellee in this cause.

Assignment No. 3.

The court erred in decreeing that the libellant, The United States of America, recover from the

libellee, The Steamship "President Coolidge", her engines, boilers, machinery, [32] tackle, apparel, and furniture, as a penalty, the sum of $500.00.

Assignment No. 4.

The Court erred in ordering that the libellant, the United States of America, recover from the libellee, The Steamship "President Coolidge", the cost of these proceedings, taxed in the sum of $37.65.

Assignment No. 5.

The court erred in finding as a fact from the evidence presented that on August 26th, 1937, there was thrown from The Steamship "President Coolidge" into the navigable waters of Honolulu harbor garbage consisting in part of orange skins, celery and tea-leaves.

Assignment No. 6.

The court erred in not finding as a special finding of fact that the refuse thrown from The Steamship "President Coolidge" fell entirely upon the witness, Arthur, and in the boat operated by him and that, therefore, none of the said refuse matter was thrown into the navigable waters of Honolulu harbor.

Assignment No. 7.

The court erred in finding as a conclusion of law from the evidence introduced herein that when on August 26th, 1937, said refuse matter was thrown from said vessel into the navigable waters of Hono-

lulu harbor, said vessel was a vessel "used or employed" in a violation of 33 U. S. C., Section 407 within the meaning of 33 U. S. C., Section 412.

[33]

Assignment No. 8.

That the court erred in not finding as a conclusion of law from the evidence introduced herein that when on August 26th, 1937, said refuse matter was thrown from said vessel that said vessel was not a vessel "used or employed" in a violation of 33 U. S. C., Section 407, within the meaning of 33 U. S. C., Section 412.

Assignment No. 9.

That the court erred in finding as a conclusion of law from the evidence introduced herein that The Steamship "President Coolidge" is liable for a pecuniary penalty in accordance with the provisions of 33 U. S. C., Section 412.

Wherefore, libellee and claimant pray that the said decree may be reversed, and for such other and further relief as to the court may seem just and proper.

Dated: Honolulu, T. H., this 1st day of April, 1938.

THE STEAMSHIP "PRESIDENT COOLIDGE", libellee, and Dollar Steamship Lines, Inc., Ltd., claimant,

By THOMPSON, WOOD & RUSSELL

(s) J. P. RUSSELL

Their Proctors.

Due service, by copy of the within Assignment of Errors is hereby admitted.

(s) J. F. McLAUGHLIN
Ass't U. S. Atty.
Honolulu, Hawaii
April 1, 1938.

[Endorsed]: Filed April 1, 1938. [34]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

Upon the application of The Steamship "President "Coolidge", libellee, and Dollar Steamship Lines, Inc., Ltd., claimant herein, and upon the petition of their proctors, Thompson, Wood & Russell, it is hereby ordered that the notice of and petition for appeal heretofore filed and entered herein by libellee and claimant, be and the same is hereby granted; and that an appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit from the decree heretofore on the 21st day of March, 1938, be and the same is hereby allowed; and that a transcript of the record of all proceedings and papers upon which the decree was made, duly certified and authenticated, be transmitted under the hand and seal of the clerk of this court to the United States Circuit Court of [36] Appeals

for the Ninth Judicial Circuit of the United States of America, at Honolulu, Territory of Hawaii.

Dated: Honolulu, T. H., this 1st day of April, 1938.

(s) EDWARD M. WATSON
Judge of the above entitled Court

[Endorsed]: Filed April 1, 1938. [37]

[Title of District Court and Cause.]

CITATION ON APPEAL

The United States of America—ss.

The President of the United States of America,

To: The United States of America and to Ingram M. Stainback, United States Attorney for the Territory of Hawaii: Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Judicial Circuit of the United States of Amerca, in the City and County of San Francisco, State of California, ~~Honolulu, Territory of Hawaii,~~ [W.F.T.] within thirty (30) days from the date of this writ, pursuant to an order allowing an appeal, filed in the clerk's office of the United States District Court for the Territory of Hawaii, wherein you are the libellant and The Steamship "President Coolidge" [39] is the libellee, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States of America, this 1st day of April, 1938.

(s) EDWARD M. WATSON
Judge,
United States District Court,
Territory of Hawaii

(s) WM. F. THOMPSON, JR.
Clerk,
United States District Court,
Territory of Hawaii

Received a copy of the within citation.

INGRAM M. STAINBACK
United States Attorney,
District of Hawaii

By (s) J. FRANK McLAUGHLIN
Asst. United States Attorney
District of Hawaii [40]

[Title of District Court and Cause.]

PRAECIPE

To: The Clerk of the above entitled Court:

You will please prepare Apostles on Appeal in this cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, said Apostles to be in conformity with Rule IV, Subdivision (1) of the Admiralty Rules of said court, and include in said

Apostles copies of the following pleadings, proceedings and papers on file, to-wit:

1. Libel and Monition, filed August 26th, 1937.
2. Stipulation, dated August 26th, 1937.
3. Order of Release, dated August 26th, 1937.
4. Claim of Agent on Behalf of Owner, filed September 3rd, 1937.
5. Answer, filed October 26th, 1937.
6. Notice of Taking Deposition, filed December 16th, 1937. [42]
7. Special Findings of Fact and Conclusions of Law, dated March 21st, 1938.
8. Decree, dated March 21st, 1938.
9. Notice of Filing Decree, dated March 21st, 1938.
10. Transcript of Testimony.
11. Clerk's minutes.
12. All original exhibits introduced in evidence.
13. Notice of and Petition for Appeal.
14. Assignment of Errors.
15. Order Allowing Appeal.
16. Citation on Appeal.
17. This Praecipe.

Dated: Honolulu, T. H., this 5th day of April, 1938.

THE STEAMSHIP "PRESIDENT COOLIDGE" and Dollar Steamship Lines, Inc., Ltd.,
Libellee and claimant respectively,
By THOMPSON, WOOD & RUSSELL
Their Proctors

Due service by copy of the within Praecipe is hereby admitted.

(s) J. F. McLAUGHLIN
Asst. U. S. Atty.
Honolulu, Hawaii

April 6, 1938.

[Endorsed]: Filed April 6, 1938. [43]

PROCEEDINGS RE ORDER FIXING AMOUNT OF BOND

From the Minutes of the United States District Court for the Territory of Hawaii
Thursday, August 26, 1937.

[Title of District Court and Cause.]

Personally appeared Mr. J. F. McLaughlin, Assistant United States Attorney, who asked that bond be fixed in the above entitled case. The Court fixed bond at $1,000.00. [44]

PROCEEDINGS RE ORDER SETTING CASE FOR TRIAL

From the Minutes of the United States District Court for the Territory of Hawaii
Tuesday, February 15, 1938.

[Title of District Court and Cause.]

By agreement of counsel this case was set for trial on March 17, 1938 at 10 o'clock a. m. [45]

PROCEEDINGS AT TRIAL

From the Minutes of the United States District Court for the Territory of Hawaii
Thursday, March 17, 1938.

[Title of District Court and Cause.]

On this day came Mr. J. F. McLaughlin, counsel for the libellant herein, and also came Mr. J. P. Russell and Mr. A. G. Bowman, of the firm of Thompson, Wood & Russell, counsel for the libellee. This case was called for trial. Mr. McLaughlin made the opening statement on behalf of the government. It was stipulated the Master of the SS "President Coolidge" might be called out of turn. Carl Albert Ahlin, Master of the SS "President Coolidge", was called and sworn and testified on behalf of the libellee. Norman R. Arthur, Boatman, U. S. Engineers, was called and sworn and testified on behalf of the libellant. Philip D. Funtes, of the Coast Guard Service, was called and sworn and testified on behalf of the libellant. At 11:55 a. m. the Court ordered that this case be continued to 2 p. m. this day. At 2:22 p. m. Mr. Bowman made an oral motion to dismiss the libel. This motion was denied by the Court and an exception noted. Charles B. Gjedsted, third officer, SS "President Coolidge", was called and sworn and testified on behalf of the libellee. It was stipulated that if Dennis S. Holler and Frank J. Wood, second officer and first officer, respectively, of the SS "President Coolidge" were called they would testify that the

steamship company issued instructions, and the captain gave instructions regarding the disposal of rubbish, etc., while in port and notice in English and Chinese was posted and oral orders were given that no rubbish, etc., should be thrown overboard. [46] William Allen Dougen, chief engineer, SS "President Coolidge", was called and sworn and testified on behalf of the libellee. Libellee's Exhibit No. 1, copy of circular letter dated March 5, 1932, was admitted in evidence, marked and ordered filed. Alan L. Bissell, chief steward, SS "President Coolidge", was called and sworn and testified on behalf of the libellee. Libellee's Exhibit No. 2, copy of circular 197, steward's Department, dated July 8, 1936, was admitted in evidence, marked and ordered filed. Libellee's Exhibit No. 3, notice in English and Chinese, in frame, was admitted in evidence, marked and ordered filed. This exhibit was withdrawn and the English portion read into the record. Libellee's Exhibit No. 3, depositions as a whole, testimony of Dale E. Collins, was admitted in evidence, marked and order filed. The objections in the deposition were at this time waived by Mr. McLaughlin. Both sides rested. At 3:27 argument was had by Mr. McLaughlin. At 3:40 p. m. argument was had by Mr. Bowman on behalf of the libellee. At 3:55 p. m. argument on rebuttal was had by Mr. McLaughlin. The Court found that a technical violation had been committed. The Court found the libellee guilty as charged and ordered that the libellee pay a minimum fine in the amount

of $500.00 with costs assessed. Counsel for the libellee noted an exception and gave notice of appeal. [47]

PROCEEDINGS ALLOWING COSTS.

From the Minutes of the United States District Court for the Territory of Hawaii.

Monday, March 21, 1938.

[Title of District Court and Cause.]

On this day came Mr. J. F. McLaughlin, Assistant United States Attorney, and also came Mr. J. P. Russell, of the firm of Thompson, Wood & Russell, counsel for the libellee. This case was called for hearing on a motion for taxation of costs. On motion of Mr. McLaughlin the item of $2.00, United States Marshal's costs for service of release, was stricken. The clerk was ordered to delete said item and to change the total to $37.65 and initial the change. The motion for taxation of costs in the sum of $37.65 was allowed by the Court. The special findings of fact and conclusions of law was presented, signed and ordered filed. The decree was presented. The Clerk was ordered to change the amount of costs from $39.65 to $37.65 and initial the change. There being no objections as to form the decree was signed and ordered filed. Mr. Russell entered an exception to the Court's findings of fact and conclusions of law and to the decree as filed. Said exception was noted and allowed. The decree reads as follows:

"[Title of Cause.]

DECREE.

This cause having come on regularly for trial on March 17, 1938, before the Honorable Edward M. Watson, Judge of [48] the above entitled court, upon the pleadings filed by the respective parties and the allegations and proofs on behalf of the parties having been heard and considered, and the court having orally rendered its decision in this cause on March 17, 1938 and on the 21st day of March, 1938, in accordance with Admiralty Rule 46½ having filed its Special Findings of Fact and Conclusions of law, now therefore, upon the motion of Ingram M. Stainback, United States Attorney, proctor for the libellant, it is hereby

Ordered, adjudged and decreed by the court that the libellant, the United States of America, recover from the libellee, The Steamship "President Coolidge", her engines, boilers, machinery, tackle, apparel and furniture, as a penalty, the sum of Five Hundred Dollars ($500.00), together with all costs of this suit, which are hereby taxed in the sum of Thirty-seven Dollars and Sixty-five Cents ($37.65).

And it appearing to the court that the libellee, The Steamship "President Coolidge", her engines, boilers, machinery, tackle, apparel and furniture, has been released to the Dollar Steamship Lines, Inc., Limited, owner and claimant in this cause, upon a Stipulation for value in the sum of One Thousand Dollars ($1,000.), dated August 26, 1937, signed by K. A. Ahlin, Master of said vessel, on be-

half of her owner and claimant, with the United States Fidelity and Guaranty Company, as surety, conditioned that said principal and surety shall abide by and perform the decree of this court, it is hereby further

Ordered, adjudged and decreed that unless this decree shall be satisfied or proceedings thereon stayed by appeal, within ten (10) days after notice given by the proctor for the libellant to the proctors for the libellee and said claimant of [49] the entry of this decree and the taxation of costs herein, the said surety, the United States Fidelity and Guaranty Company, shall cause the engagements of its Stipulation to be performed, or show cause within five (5) days after the expiration of said period of ten (10) days why execution should not issue against it, its lands, goods and chattels, according to said Stipulation to satisfy this decree.

Dated: Honolulu, T. H., March 21st, 1938.

(s) EDWARD M. WATSON,
Judge
United States District Court for the
Territory of Hawaii.

Approved as to Form:
INGRAM M. STAINBACK,
United States Attorney, District of Hawaii.
By (s) J. FRANK McLAUGHLIN,
Asst. U. S. Attorney, District of Hawaii,
Proctor for Libellant.
(s) J. P. RUSSELL,
THOMPSON, WOOD & RUSSELL,
Proctors for Libellee & Claimant." [50]

Adm. 296.

LIBELLEE'S EXHIBIT No. 1.

Admitted in Evidence 3-17-38.

Dollar Steamship Lines, Inc. Ltd.
Erie Pier No. 9, Jersey City
New Jersey

Fourth Issue.
Circular Letter. March 5th, 1932.

To: Masters, Chief Officers,
Ch. Engineers, Chief Stewards,
All Ships.

As you know, there is a strict law against the dumping overboard of any garbage and/or the pumping overboard of oil, bilge water, sludge, etc., into the waters of New York Harbor, and while tied up at any berth in New York, and any violation makes the ship subject to a heavy fine.

Although we have been sending warnings to all concerned aboard our ships, we are still receiving complaints from the Supervisor, New York Harbor, and on two recent ships the Company has had to pay a fine.

We are again handing the Chief Steward and the Chief Engineer of each ship, copy of Special Notice issued by the Supervisor, and we would suggest that same be posted in a conspicuous place in the galley and in the engine room.

In addition to posting this notice, the Chief Steward should handle the matter with his Number One Boy, instructing him that under no cir-

cumstances is garbage to be dumped overboard or thrown through port holes in the galley while in port, or while within New York Harbor limits, and requesting that he preach this gospel to the Chinese crew. Further, the Chief Steward should impress upon the mind of his No. 1 Boy that should this rule be violated and the ship made subject to a fine, that he, the No. 1 Boy will be held accountable to the Company for the amount of this fine, and any of his boys caught violating this rule will be discharged at Shanghai and will not be reemployed on any Dollar Line vessel.

The Chief Engineer, of course, will instruct all concerned in his department regarding the necessity of not pumping overboard any fuel oil, bilge water or sludge while within the prescribed limits of New York Harbor, and anyone found guilty of violating this rule will be dismissed from service with the Dollar Line.

Yours very truly,
DOLLAR STEAMSHIP LINES, INC., LTD.
By (s) J. L. LOUNSBERY.

Asst. read & returned.
W. A. D.

Copy posted.
JLL:JL [51]

Special Notice to Steamship Companies

Discharge of Refuse, Debris, Sludge, Acid, Oil or Similar Matter in New York Harbor or its Adjacent Waters Prohibited by Congress.

Provisions of United States law establishing penalties and offering rewards to informers.

(Extract from the Act of Congress approved June 29, 1888 (25 Stats. 209))

"Be it Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the placing, discharging, or depositing, by any process or in any manner, of refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind, other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the tidal waters of the harbor of New York, or its adjacent or tributary waters, or in those of Long Island Sound, within the limits which shall be prescribed by the Supervisor of the Harbor, is hereby strictly forbidden, and every such act is made a misdemeanor, and every person engaged in or who shall aid, abet, authorize, or instigate a violation of this section, shall, upon conviction be punishable by fine or imprisonment, or both, such fine to be not less than two hundred and fifty dollars nor more than two thousand five hundred dollars, and the imprisonment to be not less than thirty days nor more than one year, either or

both united, as the judge before whom conviction is obtained shall decide, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction of this misdemeanor."

Not only is the discharge of the before-mentioned matter, including oil refuse, illegal in the waters of New York Harbor and Long Island Sound, and their tributary waters, but also the law forbids such deposits in their adjacent waters. Therefore,

1. Vessels leaving or entering port having on board an accumulated quantity of garbage or refuse, shall not discharge it overboard within 25 miles of Ambrose Channel Lightship.

2. Bilge water containing oil, is not to be pumped overboard within the same limits.

3. Ballast water carried in fuel-oil tanks, is to be discharged as far offshore as is consistent with existing weather conditions, and the stability of the vessel.

Refuse not only obstruct waterways, but pollutes the beaches, creating a most unsanitary condition, and a consequent menace to public health. [52]

Your attention is therefore invited to the foregoing law and instructions, and you are urged to give your support toward preventing the acts prohibited. As you will perceive by the provision offering a reward of one-half of the fine imposed, information furnished by you may be to your profit. Any evidence you may have or may obtain con-

cerning violations of the law should be communicated to

The Supervisor of New York Harbor,
39 Whitehall Street,
New York City.

who is charged with the duty of seeing that offenders are promptly brought to punishment.

R. DRACE WHITE,
Captain, U. S. Navy,
Supervisor of New York Harbor. [53]

Adm. 296.

LIBELLEE'S EXHIBIT No. 2

Admitted in Evidence 3-17-38.

Steward Department
Circular 197
Amendment to Circular #193
July 8, 1936.

Dollar Steamship Lines, Inc.

Subject: Locking of Garbage Chutes.
To All Chief Stewards:

Please be advised that we are providing all garbage chutes with a hasp in order that they may be padlocked while ships are in various ports.

You are instructed to personally see that all chutes are locked before entering ports and not opened until the ship is fifty miles at sea when proceeding westward. Ships enroute to Los Angeles

are instructed not to dump garbage or refuse of any nature until well past Point Sur.

Yours very truly,

OHS (Signed) O. H. SMITH. [54]

Adm. 296.

LIBELLEE'S EXHIBIT No. 3

Admitted in Evidence 3-17-38.

[Title of District Court and Cause.]

DEPOSITION ON BEHALF OF THE LIBELLEE TAKEN IN NEW YORK, N. Y., JANUARY 13, 1938.

FRANK L. STEVENS & CO.,
Shorthand Reporters,
2 Rector Street, New York.

Telephone: Whitehall 4-8638. [55]

Room 1001
67 Broad Street, New York

January 13, 1938

Deposition of witness on behalf of the Libellee, convening and commencing at the office of Sawyer Thompson, Esq., 67 Broad Street, New York City, at the hour of 10 o'clock A. M., pursuant to notice attached hereto, before G. Frank Dougherty, Esq., a

Notary Public for the State of New York, qualified to act in and for the County of New York.

Appearances

Thompson, Wood & Russell, by Sawyer Thompson, on behalf of the Libellee.

Lamar Hardy, United States Attorney for the Southern District of New York, by Thomas McCall, Assistant United States Attorney, for the Libellant. [56]

United States of America,
State of New York,
County of New York—ss.

I, G. Frank Dougherty, a Notary Public for the State of New York, qualified to act in and for the County of New York, certify that the following witness appeared and the following proceedings were had before me, pursuant to the notice attached hereto.

[Seal] (s) G. FRANK DOUGHERTY,
Notary Public, Nassau County.

Cert. filed N. Y. Co., No. 445. Reg. No. 9D307.

Commission Expires March 30th, 1939. [57]

DALE E. COLLINS,

a witness produced on behalf of the Libellee, after first being duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. What is your full name?

A. Dale E. Collins.

Q. And where do you reside?

A. At 828½ South Normandy Street, Los Angeles, California.

Q. What is your occupation?

A. I am Master of the steamship "President Harrison", of the Dollar Steamship Line.

Q. What license do you hold?

A. A Master's license for any tonnage on any ocean.

Q. How long have you held such license?

A. Since 1934.

Q. Where is the steamship "President Harrison" now?

A. It is lying at the Erie pier, Jersey City.

Q. In the Port of New York?

A. Yes, sir.

Q. When did she arrive?

A. On January 11.

Q. When is she scheduled to depart?

A. January 15.

Q. How long have you been Master of the "President Harrison"?

A. Since October 22, 1937.

(Testimony of Dale E. Collins.)

Q. By whom were you employed just prior to that?

A. By the Dollar Steamship Line.

Q. In what capacity?

A. As chief officer of the steamship "President Coolidge". [58]

Q. When did you serve in that capacity on the "President Coolidge"?

A. From August 21 to October 13.

Q. You served in such capacity on August 26, 1937?

A. Yes, sir.

Q. Do you recall where the "President Coolidge" was on that day?

A. Yes; she was in Honolulu.

Q. Approximately, at what time did you arrive in the harbor?

A. Approximately, at 7 A. M.

Q. What time did you dock?

A. About 7:30 A. M.

Q. Do you know that a libel has been filed against the steamship "President Coolidge" by the United States of America charging that, during the forenoon of that day, in Honolulu Harbor, refuse matter, to-wit, garbage, consisting of celery, oranges, tea leaves, etc., was thrown from said vessel into Honolulu Harbor?

A. I do.

Q. When did you first learn of the alleged dumping?

A. About 10 A. M. that morning of the arrival in Honolulu.

(Testimony of Dale E. Collins.)

Q. How did you learn of it?

A. The man in charge of the Honolulu Engineers' boat came to my room and said that a bucket of garbage had been dumped into his boat from the stern of the vessel; and suggested that I investigate the matter immediately.

Q. Did he say anything about refuse being dumped into the Harbor?

A. No sir. [59]

Q. Do you recall his exact words?

A. No, I can't give you his exact words, but I will give them as nearly as possible. He said, "Mr. Mate, a bucket of garbage was dumped into our boat while I was passing underneath the stern. I think it was done deliberately. It is my intention to see that the ship is fined for this offense."

Q. At what time did the person say that this dumping had happened?

A. He said it happened a few minutes before he came to my room. He came directly to my room after his boat was docked at the end of the pier.

Q. What time was that ?

A. Approximately 10 A. M.

Q. After that conversation what did you do?

A. I immediately——

Mr. McCall: I object to the question on the ground it is incompetent, immaterial and irrelevant.

A. I immediately went aft to the scene of the alleged dumping to investigate the matter, and I questioned all the men in the vicinity to see if they

(Testimony of Dale E. Collins.)

knew the person, or persons, who had supposedly dumped garbage into the boat.

Mr. McCall: I move to strike out the answer as the Captain was not present at the time and the place of the dumping.

Q. How many men did you question? [60]

Mr. McCall: I object as incompetent, irrelevant and immaterial.

A. I questioned all the Chinese in the vicinity who were working on the decks and all members of the crew who were lounging in that vicinity.

Q. What did you say to them and what did they say to you?

Mr. McCall: I object as incompetent, irrelevant and immaterial. The captain was not present at the time.

A. "Have any of you people thrown any garbage over the side?" and their answers were "No".

Q. Did you see any refuse matter thrown overboard in the morning of August 26, 1937?

A. No, sir.

Q. As Chief Officer, what were your duties especially in regard to dumping?

Mr. McCall: I object as incompetent, irrelevant and immaterial.

A. It is the Chief Officer's duty in regard to dumping garbage to see that the Captain's orders are carried out; in regard to that matter, there should be no dumping of refuse or fuel oil of any kind into harbors. It was my duty to instruct all

(Testimony of Dale E. Collins.)

the department heads to that effect. Notices were posted, in English and in [61] Chinese, so that all members of the crew would know the Captain's orders in that respect.

Mr. McCall: I move that the answer be struck out.

Q. Prior to reaching Honolulu Harbor on August 26, 1937, did the Captain of the ship issue any orders to you with respect to the dumping of refuse or garbage into the harbor while in Port?

Mr. McCall: I object as incompetent, irrelevant and immaterial.

A. Yes, sir.

Q. What were the orders?

Mr. McCall: I object as incompetent, irrelevant and immaterial, and no bearing on the issues.

A. The Captain's orders to me were to see that all department heads were notified, and he ordered notices posted regarding the dumping of garbage in port; no garbage was allowed to be dumped at any time in port.

Mr. McCall: I move that the answer be struck out.

Q. Pursuant to the orders, what did you do?

A. I immediately notified all the department heads——

Mr. McCall: I object to the question as incom- [62] petent, irrelevant and immaterial.

(Testimony of Dale E. Collins.)

A. ——and the No. 1 boy to see that the notices were posted.

Mr. McCall: I move that the answer be struck out as incompetent, irrelevant and immaterial.

Q. What facilities did the "President Coolidge" have at that time for the disposal of garbage while in port?

A. About ten fifty-gallon drums stationed in the fantail, aft, for disposal of garbage in port.

Q. What was done with the drums?

Mr. McCall: I object to the question as incompetent, irrelevant and immaterial, no bearing on the question as to whether that garbage was thrown overboard; it is part of the custom, and in fact cannot be denied.

A. Those drums are dumped after we get to sea; the garbage dumped from the drums after we get to sea.

Q. Did you authorize the dumping of any garbage or refuse over the side while in Honolulu Harbor on or about the 26th day of August, 1937?

Mr. McCall: I object to the question as incompetent, irrelevant and immaterial.

A. No, sir. [63]

Q. You spoke of the company's notices with respect to dumping while in port and you stated that notices were posted on the ship. Were those notices posted on August 26, 1937?

Mr. McCall: I object to the question as incompetent, irrelevant and immaterial.

A. May I ask you a question?

(Testimony of Dale E. Collins.)

Q. Yes.

A. You say the company's notices? You mean the company's notices? Notices posted by the officers?

Q. Yes. I will reframe the question.

Mr. McCall: I object.

Q. You spoke of notices which were posted with respect to the dumping of garbage and other refuse while in port and you said that notices were posted on the ship. Were those notices posted on August 26, 1937?

A. No, sir. They were posted August 25, a day prior to that.

Q. Did they remain in place on August 26?

A. Yes, sir.

Mr. Thompson: That is all. [64]

Cross Examination

By Mr. McCall:

Q. Whereabouts was this garbage said to have been dumped or thrown from the ship—from what of the ship?

A. The fan-tail, aft of the ship.

Q. At what time did you first see the inspector who said it had been thrown?

A. Approximately, 10 A. M.

Q. Where were you during the half an hour preceding 10 A. M.?

A. I was in the vicinity of the bridge.

Q. That is in the forward part of the boat?

A. Yes, sir.

(Testimony of Dale E. Collins.)

Q. You were not at the place where the garbage was said to have been dumped until you went there after hearing that there had been a dumping of garbage?

A. No, sir.

Q. You know nothing of the matter of your own knowledge?

A. No, sir.

Mr. McCall: That is all.

Redirect Examination

By Mr. Thompson:

Q. At the time of the alleged occurrence did you see any refuse floating in the water?

A. No, sir.

Q. What facilities did the ship have for the disposal of garbage at sea?

Mr. McCall: I object to the question as being [65] incompetent, irrelevant and immaterial.

A. We have slop-chutes from the galley, and also slop-chutes from the steerage galley.

Q. Are the slop-chutes used while you are in port?

A. No, sir.

Mr. McCall: I object as being incompetent, irrelevant and immaterial.

Q. What is done to them while you are in port?

Mr. McCall: I object as incompetent, irrelevant and immaterial.

A. The slop-chute had a lid which can be locked, in the galley, and I have a padlock which I attach to it while in port; it is locked.

(Testimony of Dale E. Collins.)

Q. Were the slop-chutes on the "President Coolidge" locked on the 26th of August, 1937?

A. Yes, sir.

Q. Did you lock them personally?

A. No, sir.

Q. Did you see that they were locked?

A. I saw to it that they were locked. I checked up immediately after this report to see if they were locked.

Recross Examination

By Mr. McCall:

Q. Can all the slop-chutes be locked?

A. Yes, sir.

Q. All inside the ship can be locked?

A. Yes, sir. [66]

Q. There are slop-chutes outside the ship?

A. There is one.

Q. Can that be locked?

A. No, sir.

Q. Where is that?

A. On the aft rail, the fan-tail.

Mr. McCall: That is all.

By Mr. Thompson:

Q. Where are the garbage disposal cans, or drums, in relation to the open slop chute?

A. Right alongside slop-chute, on the same side, right on deck.

Mr. Thompson: That is all.

Examination Concluded

(s) DALE E. COLLINS.

Subscribed and sworn to before me this 14th day of January, 1938.

[Seal] G. FRANK DOUGHERTY.
Notary Public, Nassau County.

Cert. filed N. Y. Co. No. 445, Reg. No. 9D307.

Commission expires March 30th, 1939. [67]

[Title of District Court and Cause.]

United States of America,
State of New York,
County of New York.—ss.

I hereby certify that on the 13th day of January, 1938, before me, G. Frank Dougherty, a Notary Public for the State of New York, qualified to act in and for the County of New York, personally appeared, pursuant to the notice hereto annexed, between the hours of 10 o'clock A. M. and 1 o'clock P. M., the witness named in the said notice, such witness being Dale E. Collins; and Thompson, Wood & Russell, by Sawyer Thompson, Esq., appeared as counsel for the Libellee, and Lamar Hardy, Esq., United States Attorney for the Southern District of New York, by Thomas [68] McCall, Esq., appeared for the Libellant; and the said witness being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said, as appears by the deposition hereto annexed.

And I further certify that the said deposition was reduced to writing under my personal supervision, and was, after it had been reduced to writ-

ing, subscribed by the witness, and the same has been retained by me for the purpose of sealing up and directing the same to the Clerk of the Court as required by law.

And I further certify that the reason why the said deposition was taken was that the said witness resides at more than one hundred miles from the place where this cause is to be tried.

And I further certify that I am not of counsel or attorney to either of these parties, nor am I interested in the event of the cause.

In testimony where, I have hereunto set my hand and official seal at the City of New York, in the County of New [69] York and State of New York, this the 14th day of January, A. D., 1938.

(s) G. FRANK DOUGHERTY (Seal)
G. FRANK DOUGHERTY
Notary Public, Nassau County

Cert. Filed N. Y. Co. No. 445, Reg. No. 9D307

Commission expires March 30th, 1939. [70]

NOTICE OF TAKING DEPOSITION

With admission of service
(Attached to Original) [71]

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[72]

[Title of District Court and Cause.]

CITATION ON APPEAL.

The United States of America.—ss.
The President of the United States of America,

To: The United States of America and to Ingram M. Stainback, United States Attorney for the Territory of Hawaii: Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Judicial Circuit of the United States of America, in the City and County of San Francisco, State of California, ~~Honolulu, Territory of Hawaii,~~ [W.F.T.] within thirty (30) days from the date of this writ, pursuant to an order allowing an appeal, filed in the clerk's office of the United States District Court for the Territory of Hawaii, wherein you are the libellant and The Steamship "President Coolidge" [74] is the libellee, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States of America, this 1st day of April, 1938.

EDWARD M. WATSON,
Judge,
United States District Court,
Territory of Hawaii.

WM. F. THOMPSON, JR.,
Clerk,
United States District Court,
Territory of Hawaii.

Received a copy of the within citation.
INGRAM M. STAINBACK
United States Attorney
District of Hawaii.
By (s) J. FRANK McLAUGHLIN
Asst. United States Attorney
District of Hawaii. [75]

[Title of District Court and Cause.]

TRANSCRIPT

of proceedings and testimony before the Honorable Edward M. Watson, Judge presiding, in the above entitled Court on Thursday, March 17, 1938, commencing at 10:35 a. m., the Libellant appearing by J. Frank McLaughlin, Assistant United States Attorney; the Libellee appearing by Messrs. J. P. Russell and A. G. Bowman of the law firm of Thompson, Wood & Russell.

Mr. McLaughlin: Ready for the Government.

Mr. Bowman: Ready for the plaintiff. In this case our appearance has been entered for the Dollar Steamship Lines, Inc., Ltd., the claimant; Mr. Russell and I, representing the firm of Thompson, Wood & Russell, are handling this. [78]

The Court: Your names will be entered, Mr. Bowman and Mr. Russell appearing on behalf of the firm of Thompson, Wood & Russell.

Mr. McLaughlin: May it please the Court, this case in Admiralty was instituted by the United States on August 27th, 1937, pursuant to the pro-

visions of Title 33 of the United States Code, Sections 407, 411, and 412. The libel against the Steamship "President Coolidge", her engines, boilers, machinery, tackle, apparel and furniture, reads as follows: "To the Honorable, the Presiding Judge of the above entitled Court:—"

The Court: I have read the pleadings, Mr. McLaughlin, and I don't believe it will be necessary to take up the time reading the complaint.

Mr. Russell: Your Honor has also read the answer?

The Court: Yes. The answer admits that the ship was lying in the harbor on that day, and denies practically all of the other allegations of the complaint.

Mr.McLaughlin: As the allegations of the libel have been denied by the claimant of the vessel, the Government will introduce evidence to substantiate the same; and we will show that on this particular day in question, August 26th, 1937, from the vessel the "President Coolidge" there was thrown into Honolulu harbor rubbish consisting in part of garbage, consisting of celery, orange shells, tea leaves, and so forth; and the conclusion which we desire to have the Court arrive at from the evidence which we will introduce is that on this particular day by virtue of these acts the [79] "President Coolidge" violated the law and is subject to a penalty under the law. I am at this time ready to proceed with the Government's case; but it has been requested, in view of the fact that the master of the "Presi-

dent Coolidge" who is here in court has an appointment shortly,——

The Court: That he may be called out of turn?

Mr. McLaughlin: That he may be called out of turn, and to that I have no objection at all.

The Court: That's agreeable to the Court. The master doesn't happen to be the same gentleman who gave his deposition already in this case, does he?

Mr. Bowman: No. We have the deposition of Collins, who was formerly chief officer.

Mr. Russell: Captain Ahlin is master of the "President Coolidge" now, and I'd like to call him as my first witness.

The Court: All right; he may be called out of turn.

CARL ALBERT AHLIN

being first duly sworn as a witness for the Libellee, testified as follows:

Direct Examination

By A. G. Bowman, Esq.:

Q. What is your name, please, your full name?

A. Carl Albert Ahlin.

Q. And where is your residence?

A. 6981 Vincente Avenue, Berkeley, California.

Q. What is your present occupation?

A. Ship master.

Q. Of what ship? [80]

The Court: You'll be permitted to ask leading questions to bring out this information; it will save

(Testimony of Carl Albert Ahlin.)

considerable time, I think. This information that, I take it, is not in dispute at all; Captain Ahlin is master of the ship "President Coolidge", that arrived in port this morning, I believe.

A. Yes, Your Honor.

The Court: How long have you been master of that ship?

A. Since she was built in 1931, sir.

The Court: Continuously?

A. Yes sir.

The Court: Proceed, Mr. Bowman.

Mr. Bowman: And your employer is the Dollar Steamship Lines, Inc., Ltd.?

A. Yes sir.

Q. And you receive instructions from the Dollar Steamship Lines, Inc., Ltd., relative to the operation of your ship?

A. Yes sir.

Q. And can you tell us what are the departments of the ship; there are various departments, are there not, on board ship; can you tell us briefly what they are?

A. Well, there are only two departments, the engine room and the deck; and the steward comes in with the hotel end of it.

Q. Who is in charge of these departments?

A. The chief engineer of the engine room; the chief officer of the deck; the chief steward of the hotel part of it.

The Court: All of these under your general supervision?

(Testimony of Carl Albert Ahlin.)

A. All under my supervision.

The Court: As master of the ship you have supervision of the entire crew in all of the de-departments? [81]

A. When away from home, yes.

Mr. Bowman: Can you tell us approximately how many are employed on board the ship?

A. Right now, 359.

Q. And on August 26th, 1937?

A. Somewhat less; I think, about 330.

Q. Who is the chief officer on board now?

A. Mr. Heine.

Q. And who was chief officer on August 26th, 1937?

A. Mr. Collins.

Q. Dale E. Collins?

A. Yes, that's right.

Q. Is he on board now?

A. No sir; he's now master of the "President Harrison".

Q. Do you know where he resides?

A. No, I do not, sir.

Q. What are the duties of the chief officer?

A. Oh, supervising the ship in general, outside of the engine room; he doesn't go down there and do anything, but outside of that he looks over everything in general.

The Court: Sort of an executive officer under the captain's immediate orders?

A. Yes, Your Honor.

(Testimony of Carl Albert Ahlin.)

The Court: And he sees that the captain's orders are carried out?

A. Yes, Your Honor.

Mr. Bowman: Do you recall where the "President Coolidge" was on August 26th, 1937?

A. It sort of slipped my memory, but I understand we were in Honolulu on that day. The ship's records will show where we were. [82]

The Court: Is it conceded for the purpose of this case that the ship was in Honolulu harbor on that day?

Mr. McLaughlin: Well, the peculiar part of it, Your Honor, is that the concession shouldn't come from the Government—

The Court: It's part of your case, I understand.

Mr. McLaughlin: I am in position to prove it.

The Court: Well, it would save time—

Mr. McLaughlin: Well, the concession—

The Court: It is conceded, then, by each side that the ship was in Honolulu harbor?

Mr. Bowman: I don't believe there will be any material issue on that.

The Court: Well, is it conceded—it's agreed?

Mr. Bowman: Yes.

Mr. McLaughlin: I agree to that.

Mr. Bowman: And do you know that a libel has been filed against the "President Coolidge" alleging that refuse matter was thrown into the harbor at Honolulu on August 26, 1937?

A. Yes, I heard of it, but I don't remember when; I think, some time after leaving Honolulu;

(Testimony of Carl Albert Ahlin.)

I was not aboard the ship when it happened, and no one said anything to me until we got away.

Q. Can you tell us whether or not there are any rules and regulations with respect to the dumping of refuse?

A. There is orders issued by the Company to me and the various heads of the departments to warn and see as far as my ability goes that nothing is thrown overboard within the harbor limits of any port that we go to. For extra [83] precautions they have locks and hasps whereby they lock up the slop-chute and that sort of stuff, as well as placing containers on the aft end of "B" deck whereby they are supposed to deposit the refuse while in port.

Q. Can you tell us whether or not there are instructions relative to the dumping of refuse?

The Court: By whom?

Mr. Bowman: Issued by you?

A. By me to the heads of the departments, and they in turn to their respective sub-heads of departments or whatever else you might call them.

Q. And you say they come to you from——

A. The Dollar Steamship Company.

Q. And in turn they are relayed to the heads of the departments on your ship?

A. Yes.

Q. And how long have these rules and regulations been in force?

A. More or less since the ship went into commission; not only on this ship but on all of the ships in the fleet there are such circulars out.

(Testimony of Carl Albert Ahlin.)

Q. And can you give us any information concerning orders issued with reference to dumping of refuse?

A. Not other than that sometimes when we have gatherings, when I get a circular of that sort I immediately get in touch with whom it concerns, and find that everybody has a copy of it and has already taken the thing in hand before I get to it.

Q. And do you have any knowledge of notices being posted about the ship?

A. Yes sir. [84]

Q. What are the nature of those notices?

A. Well, they are notices in two languages; at the time we carried Orientals, and the notices were both in Chinese and English.

The Court: You were referring to August, 1937, now, Captain, when you say "at the time"?

A. Well, in August when we were here we carried Orientals, when this thing took place. Those same signs are still hanging up there, but the Chinese language might be scratched off because there ain't any, I understand, there now; but they are in both languages.

Mr. Bowman: Can you tell us what those notices contained, to the best of your knowledge?

A. Instructions not to under any circumstances throw anything overboard while anywhere in the harbor limits; that's the rough outline of it; I haven't the wording of it exactly with me.

Q. Were the notices posted prior to August 26, 1937?

(Testimony of Carl Albert Ahlin.)

A. Yes sir.

Q. Do you know whether or not any refuse was thrown overboard on August 26, 1937?

A. No sir.

Q. Did you order any refuse to be thrown overboard?

A. No sir.

Q. Do you know whether or not anybody on board ship ordered refuse to be thrown overboard?

A. No sir.

The Court: You do know, or you do not know, Captain?

A. I do not know, sir. [85]

The Court: You weren't on the ship that day, you said?

A. No; I was ashore most of the time, sir.

The Court: What time did the ship arrive in port that morning, if you know?

A. Somewheres around 10 o'clock, I think, sir.

The Court: And what time did she get out, if you know?

A. I think her sailing hour at that time was 10 p. m.; whether we sailed on time or not I don't remember just now.

The Court: During most of the time the ship was in port you were ashore?

A. Yes sir.

The Court: Who was in charge during your absence?

A. The chief officer, sir.

The Court: Mr. Collins, at that time?

(Testimony of Carl Albert Ahlin.)

A. Yes sir.

Mr. Bowman: Captain Ahlin, you testified that there were garbage chutes which were locked. Can you explain that matter to us?

A. Slop-chutes, you mean, from the kitchen?

Q. Yes; and you mentioned locks; will you describe——

A. Nothing to describe other than a lock and hasp whereby they can't lift the lid and drop anything down into the harbor.

Q. When are they locked?

A. The steward sees to that before we enter harbor limits of any ports we go into.

Q. And those are instructions coming from you?

A. And the Dollar Company.

Q. And when are they unlocked? [86]

A. When you're clear of the pilot grounds or outside of harbor limits.

Q. Captain Ahlin, can you tell us the approximate size of the "President Coolidge"?

A. What do you have in mind?

The Court: In tonnage, or in length, or what?

Mr. Bowman: The length and height.

A. The height of the ship?

Q. From the water.

A. From the bridge she is about 60 odd feet over water.

Q. "B" deck aft is——?

A. Roughly speaking—I haven't measured it—it would be probably 35 or 40 feet, or somewheres thereabouts, maybe a little less or more.

(Testimony of Carl Albert Ahlin.)

Mr. Bowman: That's all.

Cross-Examination

By J. F. McLaughlin, Esq.:

Q. Captain, with reference to August 26, 1937, on that particular date in the steward's department of your vessel were there any Chinese employees working in the steward's department?

A. Yes sir, I think so.

Q. With reference to these notices which you've said were posted to the effect that no rubbish should be thrown overboard while in port under any circumstances, I understood you to say they were posted in both the English language and the Oriental language?

A. Yes sir.

Q. By the "Oriental language" do you mean to include that they were noticed in the Chinese language? [87]

A. Characters, yes sir.

Q. And what particular dialect?

A. Cantonese, I presume, because they were all Cantonese.

Q. Do you know whether or not the Chinese employed on the "President Coolidge" on that date were all Cantonese or spoke Cantonese dialect?

A. I think they were, practically all, because they were all from Hongkong generally, from around Canton, generally referred to as Cantonese.

Q. But actually you do not know whether they were conversant with the Cantonese dialect?

(Testimony of Carl Albert Ahlin.)

A. I think they were.

Q. You think they were?

A. I think they were; no question about it.

The Court: Could they all read write, to your knowledge?

A. No, I wouldn't know; but if one couldn't he tells the other fellow.

The Court: That's jumping at a conclusion. Just tell what you know of your own knowledge.

A. I beg your pardon.

Mr. McLaughlin: Referring to the locks on these slop-chutes which you've referred to, are the locks on those chutes padlocks or something akin to padlocks?

A. Commonly what we term "jail locks" or padlocks; there's different shapes of padlocks.

Q. What I have in mind asking you is whether or not they were locked in such a way that no regular employee other than an officer could unlock them?

A. Not unless he had a key to do it with.

Q. It requires some sort of a key, is that correct?

[88]

A. Yes sir, it does.

Q. It's more than just what they call a "dog-ear"?

A. No, no, it's a regular padlock.

Q. A regular padlock?

A. A "jail lock" is what they call it.

Q. In reference to these rules and regulations that have been promulgated by your steamship com-

(Testimony of Carl Albert Ahlin.)

pany and further promulgated by you as captain of the vessel, do you know whether or not there ever have been occasions when your orders or regulations have not been observed?

A. Not along those lines, no sir.

Q. Have you ever had any regulation of the Company or order issued from you as captain that has ever been violated?

A. Not to my knowledge.

Q. Every order that you give is always adhered to?

A. As near as possible.

Q. But is it not true, Captain, that despite rules and regulations and orders from you, that there might nevertheless be infractions thereof?

A. Not to my knowledge, sir; there shouldn't be; I have never——

The Court: You have a splendid ship if you've never had a rule broken; I have never heard of instances on ship or ashore where a rule was not sometimes violated.

Mr. McLaughlin: You understand that this question does not mean that they were violated with your consent, but contrary to your orders and directions have any of those rules and regulations to your knowledge ever been broken?

A. Not in connection with this particular case we're talking about; there may have been others, but I have no knowledge [89] of any; the seamen sometimes disobeys.

The Court: Seamen sometimes violate rules?

(Testimony of Carl Albert Ahlin.)

A. I think so.

The Court: But you say, so far as the dumping of rubbish is concerned, you have never known a violation?

A. No sir.

The Court: That's what you mean to convey?

A. That's what I have in mind, yes, Your Honor.

Mr. McLaughlin: If there was a violation of your rules and regulations with respect to no dumping of rubbish while in port, would you necessarily know whether or not rubbish was dumped in violation of those orders?

A. No sir, I wouldn't. As I stated before, I wasn't on the ship at the time.

Q. But with reference to any time, Captain, in any port?

A. Not to my knowledge.

Mr. Russell: If the Court please, may we object on the ground that testimony as to other ports and other occasions is irrelevant and immaterial. In this particular instance they have charged one particular violation, and evidence which goes outside of that violation charged does not bear on the issues in this case.

The Court: The Court has allowed a pretty liberal examination of this witness in which he has been asked to give various conclusions; I think I'll allow the cross-examination.

Mr. McLaughlin: Re-phrasing that question, Captain. As captain of the boat would you necessarily know that a regulation or order had been violated?

(Testimony of Carl Albert Ahlin.)

A. No, not at the time I wouldn't; it may be later on I'd be informed of it. [90]

Q. Would you, for example, in connection with this alleged August 26, 1937 violation, which if true was also a violation of your orders, would you in the nature of things as captain of the ship have known that rubbish on that date was thrown overboard unless some libel of this sort had been instituted?

A. No sir.

Mr. McLaughlin: That is all.

Redirect Examination.

By A. G. Bowman, Esq.:

Q. One more question, Captain. You testified that on August 26th, 1937, there were Chinese employed on the ship. Was there any person in charge of the Chinese?

A. The steward was in charge of all of them.

Q. And was there any Chinese at the head of the Chinese employees?

A. There was what they term a "number one" Chinaman who supposedly is their boss; but the steward knows more about that than I do.

Q. You say there are no Chinese on the ship now. Do you know where those Chinese are who were formerly employed?

A. No.

Q. Do you know where the "number one China boy" is?

A. Some place in Hongkong or Canton.

Mr. Bowman: That's all.

Mr. McLaughlin: That's all.

The Court: You may be excused, Captain. Is that the only witness you had to call at this time, Mr. Bowman?

Mr. Bowman: Yes. We have other witnesses, but we requested that the Captain be called out of turn.

[91]

The Court: All right; then the United States will put on its evidence in the regular order.

NORMAN R. ARTHUR

being first duly sworn as a witness for the Libellant, testified as follows:

Direct Examination

By J. F. McLaughlin, Esq.:

Q. What is your name, please?

A. Norman R. Arthur.

Q. What is your occupation?

A. Hired as boatman for the patrolling of the Honolulu harbor.

Q. By whom are you employed?

A. By the District Engineer.

The Court: United States Engineer?

A. Yes sir.

Mr. McLaughlin: And what are your duties as harbor patrol?

A. My duties as harbor patrol is to catch anyone in the throwing of any rubbish of any nature into the harbor, pumping of any bilges or of any oil lines leaking into the harbor, which is to be reported to my superior immediately.

(Testimony of Norman R. Arthur.)

Q. Your superior is whom?

A. At the present time, Major Bermel and Captain Ross.

Q. On August 26, 1937, who was your superior?

A. Major Crawford.

Q. And who is Major Crawford?

A. Major Crawford was the District Engineer.

Q. By "District Engineer" do you mean United States District Engineer?

A. Yes sir. [92]

Q. You've said that it is your duty to patrol the harbor; what harbor do you refer to?

A. Honolulu harbor.

Q. And for the purpose of patrolling the harbor in connection with the duties which you have just outlined, what facilities have you for this patrolling duty?

A. At the time of this occasion I had two launches, one a sampan and the other a motor sailer of the Navy build.

The Court: A motorboat, you say, and a sampan?

A. Yes sir.

Mr. McLaughlin: Now, directing your attention to August 26, 1937, do you know whether or not on that day the steamship "President Coolidge" was in Honolulu harbor?

A. Yes sir.

The Court: Well, was she?

A. Yes sir, she was.

Mr. McLaughlin: Was that vessel on that day at rest in Honolulu harbor?

(Testimony of Norman R. Arthur.)

A. Yes sir; she was moored alongside of Pier 8.

Q. On August 26, 1937, did you patrol Honolulu harbor?

A. Yes sir, I did.

Q. Were you engaged in patrolling the harbor in the forenoon of that day?

A. Yes sir.

Q. And in that forenoon did you patrol in the vicinity of Pier 8?

A. Yes sir, I did.

Q. And what particular boat were you using for the discharge of your patrol duties on that day?

A. I use no particular boat; I take them out in the—— [93]

The Court: Well, that morning what boat were you using?

A. My sampan.

Mr. McLaughlin: On August 26, 1937, the forenoon of that day, you've said you patrolled within the vicinity of Pier 8 where the "President Coolidge" was tied up; as you patrolled within the vicinity of the "President Coolidge" on that day do you know whether or not from that vessel any rubbish was thrown?

Mr. Bowman: We object to the question as being leading, if the Court please.

The Court: It is leading, and the Court will sustain the objection. This is a crucial point in the case. "Do you recall any particular incident that occurred at that time", if that meets with your question.

(Testimony of Norman R. Arthur.)

Mr. McLaughlin: Very well. Mr. Arthur, in connection with your patrol of the harbor on this particular date, in the forenoon thereof, do you recall any particular incident with relation to the steamship "President Coolidge" which impressed itself upon your mind?

A. I just don't quite understand you, sir.

Q. Well, let's put it this way. On the day in question, August 26, 1937, in the forenoon part of that day, as you were patrolling within the vicinity of Pier 8 where the "President Coolidge" was tied up, did you observe any infraction of—re-phrasing that part of the question; did you observe anything which you felt was within the scope of your duties?

A. At all times that's impressed on my mind by my superiors to watch and suspect all boats and watch them at all times.

The Court: Well, did anything happen there that day when [94] you were patrolling by the "President Coolidge"?

A. Yes sir.

Mr. McLaughlin: What was that?

A. As I rounded the stern of the "President Coolidge" there was a bucket of slop that was dumped squarely on my head, and which it is my duty to stop all such stuff as that; I didn't think it was a very good way it was stopped.

The Court: It was stopped by your head at that time?

A. Yes sir.

(Testimony of Norman R. Arthur.)

Mr. McLaughlin: Mr. Arthur, will you go to the blackboard and draw to the best of your knowledge a representation of Pier 8 in Honolulu harbor and a representation of the "President Coolidge" as it was tied up at that pier, and note on the diagram which you draw the direction in which you were coming when you observed this incident.

(Witness proceeds to blackboard)

The Court: Do you think that will be of any assistance?

Mr. McLaughlin: Yes, Your Honor.

The Court: The Court has a fair knowledge of waterfront conditions there, and Mr. Arthur has explained—that's more a matter of cross-examination, is it not, than direct?

Mr. McLaughlin: I do not believe so, Your Honor. I have a purpose in having the diagram drawn.

The Court: All right, go ahead; I was trying to save time, that's all.

A. (sketching): This is more or less as the pier; coming down, this is Pier 8 here; the stern of the "Coolidge" was overlapping the pier. I was coming on my patrol, while coming down the wharf, and I cut to go under the counter of the "Coolidge", and as I got over amidships or about half [95] passed that, when the rubbish came down and lit on to me; and when this rubbish lit on to me I had automatically—as the knowledge of any man operating a boat—I had thrown the boat out of gear, and you down your wheel to 'midships, and until I had

(Testimony of Norman R. Arthur.)

cleared my eyes up I had drifted between the two piers, then I proceeded over here to the other pier and laid alongside of the pier, where one the fellows from the Coast Guard was sitting on the pier, and I asked him if he seen what that fellow done, and he said, "Yes,——"

Mr. Bowman: I object——

The Court: Never mind the conversation. You were in the sampan at that time, as you've testified?

A. Yes sir.

Mr. McLaughlin: Now, with reference to the point where you were when this material hit you, just exactly how did it hit you and of what did the material consist?

A. It hit me right squarely on the head, and consisted of—there was cabbage, orange peelings, and some celery, and tea leaves, and water.

Q. Was there any particular odor to this material?

A. Well, it smelled just like swill, to my knowledge.

Q. Did any of this material land in the water?

A. Yes sir, it all did, practically all of it except the dry rubbish aboard the boat, which stayed.

Q. At the time you were hit with this material you say you worked your steering apparatus in some manner, is that correct?

A. I worked my steering apparatus to 'midships, yes sir.

(Testimony of Norman R. Arthur.)

Q. And you say your sampan drifted between the two piers?

A. Yes sir. [96]

Q. Did I understand you to say that after you were hit with this material that there were some few minutes before your sight cleared up, is that correct?

A. It wasn't a few minutes, just probably half a minute or something like that, just to wipe it out of my eyes, that's all.

Q. And after your vision became clear did you look toward the "President Coolidge"?

A. Yes sir, I did.

Q. And what did you see?

A. I seen one follow up there walk away with a can; he was carrying a can——

The Court: Seen one what?

A. One Chinese fellow, sir.

The Court: Al right; go ahead.

Mr. McLaughlin: And what was he doing?

A. All I seen him do, he was just walking; he had come from the stern of the boat and was walking over towards the cabins or whatever they call them.

Q. At the time you first saw him, will you note on that diagram exactly where he was to the best of your recollection?

A. To the best of my recollection he was just about in here, he was probably five feet off the railing when I noted him.

(Testimony of Norman R. Arthur.)

Q. Did you say he was carrying a can?

A. Yes sir.

Q. Have you knowledge as to the size of that can?

A. Well, I would imagine it would look——

The Court: We don't want your imagination.

A. About a ten gallon can, sir. [97]

The Court: You observed that, did you?

A. Yes sir.

Mr. McLaughlin: You say this individual that you saw at that time employed on the "President Coolidge" was a Chinese individual?

A. Yes sir.

Q. How was he attired, if you know?

A. As far as I could see, the upper half of him was a black shirt, and it's a little like a blue work-shirt the pants he had on.

Q. Was there anyone else on the stern of this vessel within the vicinity of this man that you saw at that time?

A. There was one other fellow sitting right over here towards this railing, by the bulkhead.

Q. Will you mark that on the diagram?

A. By this bulkhead, right here, he was sitting in here.

Q. What sort of an individual was he?

A. He was a Chinese too.

Q. How was he attired, if you know?

A. He was sitting down, with black satin pants on and a white shirt, heavy woolen undershirt.

(Testimony of Norman R. Arthur.)

Q. And those were the only two people you saw immediately after you were hit with this material?

A. Yes sir.

Q. And those people were on the stern portion of the "President Coolidge"?

A. Yes sir.

Q. You've said that you came over to the other side of the pier; is this also Pier 8?

A. No sir, that's Pier 7. [98]

Q. Was there a vessel lying alongside Pier 7?

A. The Coast Guard boats are laying alongside, sir.

Q. Do you know the number of that Coast Guard boat?

A. 838 I think is what it is.

Q. Did you see anyone within the vicinity of that Pier?

A. Yes sir, I seen this Coast Guardsman which I knew.

Q. Do you know him by name?

A. No sir, I did not.

Q. Do you know him by sight?

A. Just by sight, yes.

Q. Did you have a conversation with him?

A. Yes; we sat there and talked.

The Court: Don't tell what you said; did you talk with him?

A. Yes sir.

Mr. McLaughlin: And what did you ask him?

(Testimony of Norman R. Arthur.)

A. I asked him if he had seen what happened, and he said "Yes".

Q. Wait a minute; don't tell what he said to you; but what did you say to him?

A. I asked him if he had seen what happened, and then I asked him if he would be a witness for me, so I took his name and number of his boat, and that's all.

Q. Do you know what his name is now?

A. No sir, I couldn't call it right off.

Q. Would you know him if you saw him?

A. I would.

Mr. McLaughlin: (addressing someone in courtroom): Will you please stand.

Q. Is that the man that you had this conversation with?

A. Yes sir.

Q. What did you do after having this conversation with this man from the Coast Guard boat? **[99]**

A. I proceeded back to Pier 8 and went aboard and seen the chief mate.

Q. Well now, prior to the time you went aboard the "President Coolidge"——

The Court: How long a time elapsed between the time this stuff hit you on the head and your talk with the first officer; about how long?

A. About four or five minutes, sir.

Mr. McLaughlin: In terms of your own garments worn by you at the time you were decorated

(Testimony of Norman R. Arthur.)

with this material, did you have the same garments on when you went aboard the "President Coolidge" to see the officers thereof?

A. No, I did not.

Q. Why not?

A. Because they weren't fit to walk around the street with.

Q. What did you do?

A. I took off my clothes and put on some working clothes which I carry on my boat at all times, my painting clothes.

Q. When you went aboard the "President Coolidge" whom did you see?

A. I seen the chief mate, sir.

Q. Do you know what his name was?

A. No sir, I do not.

Q. And what did you tell him?

A. I told him just what had happened, and we proceeded back aft to find out who had done it, and he questioned everyone that he seen there, and they have the general knowledge in which all of them say they don't know, so we proceeded and got the "number one" man up, and he got the same answer, they don't know. [100]

Q. When you and the chief mate of the "President Coolidge" were making this investigation as to who may have thrown this material overboard, did you see this Chinese man in the black shirt?

A. Yes sir, I did.

Q. Where was he at that time?

(Testimony of Norman R. Arthur.)

A. When we come aboard he was sitting back in the stern there.

Q. Will you designate on that diagram where he was when you and the chief mate were making this investigation?

The Court: Mark "X" there so it will indicate.

A. He was approximately sitting right in there (indicating).

Mr. McLaughlin: Was he doing anything?

A. No sir, he was not.

The Court: Mr. Arthur, are you familiar with the deck arrangements of the "Coolidge" there in the stern of the ship; do you know what that arrangement is back there, with respect to the location of the galley, for instance?

A. No sir, I don't; I have never been through one of those ships thoroughly.

The Court: All right.

Mr. McLaughlin: Mr. Arthur, do you know whether or not the material which emanated from the "President Coolidge" on this occasion and which in part hit you came from any of the ship's slop-chutes?

A. No sir, it did not.

Q. Do you know how it was tossed overboard?

A. It was thrown over the rail.

Q. When you were investigating this matter together with the ship's chief mate, did you observe any receptables [101] for rubbish or garbage in the stern portion of this boat on this particular deck where these men were sitting?

(Testimony of Norman R. Arthur.)

A. Yes sir, and they were all full.

The Court: What was that last?

(Reporter reads last answer)

A. Yes sir, the ones that were on the stern of the boat.

The Court: All right. I just wanted to get the answer; I didn't hear it.

(Recess—11:18 to 11:22 a. m.)

The Court: Proceed with the cross-examination.

Mr. Bowman: Mr. Russell is going to conduct the cross-examination, if there's no objection.

Mr. McLaughlin: No objection on my part.

Mr. Russell: If the Court please, I understand Mr. McLaughlin wants to bring out one further question.

Mr. McLaughlin: I just want to ask one more question, if I have the Court's permission as well.

The Court: It is granted.

Mr. McLaughlin: At the time you were hit with this material do you know approximately what hour of the day it was?

A. It was somewheres between 9:20 and 10:00, somewheres around 10 or 11, somewheres in there; I couldn't tell exactly the time.

Mr. McLaughlin: That's all.

Cross Examination

By J. P. Russell, Esq.:

Q. Mr. Arthur, how long have you been employed on this particular job that you testified you occupied at that date?

(Testimony of Norman R. Arthur.)

A. I have been employed in Honolulu harbor as patrol for [102] four years, and I have been with the Engineers for six years upon another boat on which we patrolled all the Islands where they were at work surveying harbors, with the same orders.

Q. And did you say it was your duty to check up around the harbor for refuse and that sort of thing that would be thrown over?

A. Yes sir.

Q. And was that your duty during this entire period you were so employed?

A. Yes sir.

Q. Aren't you the person that went and asked Mr. Ross of the Dollar Steamship Lines to get you a new suit because you had been hit by this garbage?

A. I didn't tell him for nothing.

The Court: "I didn't tell him for nothing"; what do you mean?

A. I didn't ask him for anything.

Q. Didn't you see Mr. Ross of the Dollar Steamship Lines?

A. I seen Mr. Ross and explained to him just what had happened.

Q. You mean to tell me you didn't say anything about reimbursing you or getting your suit cleaned or getting you new clothes after this happened?

A. I mentioned about my clothes, yes sir.

Q. In fact, you were rather annoyed by this incident, weren't you, after all this garbage fell on your head?

A. Yes sir, I was.

(Testimony of Norman R. Arthur.)

Q. You were pretty mad right afterwards, weren't you?

A. I was, yes.

Q. You went over, I think you testified, and talked to this Coast Guard employee right away. How did you happen to [103] want him to be a witness?

A. For the simple reason I've got my orders that way.

Q. It wasn't just because you were mad and wanted to be sure somebody could prove to the Dollar Company that you needed a new suit?

A. No, I have no new suit, I do not wear a new suit when I am patrolling.

Q. What were you wearing?

A. I wore a blue work-shirt and blue dungaree pants.

Q. When you changed your clothes as you testified?

A. I put on my working clothes that I use for painting.

Q. How do they differ from what you used before?

A. They are absolutely the same, but the clothes you use for painting you cannot use for patrolling.

The Court: You mean they were daubed up with paint?

A. Yes sir.

Mr. Russell: In testifying I think you said you started to cut under the counter of the "Coolidge"?

A. Yes sir.

(Testimony of Norman R. Arthur.)

Q. About how far under?

A. Oh, I was within, say, about six or eight feet of the rudder, of where the rudder-post is.

Q. So there was quite an overhang up above you?

A. Not so much, sir.

Q. And were you entirely under the counter when this garbage fell on you?

A. Yes sir.

Q. Still about six feet from the rudder?

A. Well, approximately that distance; I wouldn't say for sure. [104]

Q. And about how long did it take you to clean this stuff out of your eyes so that you could see?

A. Oh, I don't think it would take me over half a minute or so, just enough to wipe my eyes.

Q. I might ask it this way: Where was your boat when you finally could see?

A. I was approximately 50 or 60 feet over, maybe 50 feet from the stern of the boat.

Q. And about what speed were you traveling at that time?

A. Around eight knots.

Q. Well now, isn't it a fact that you didn't see anybody throw anything on you?

A. I did not see it, no.

Q. You don't know whether it came out of a chute or whether it came out of a bucket?

A. I know it didn't come out of a chute.

Q. How do you know?

(Testimony of Norman R. Arthur.)

A. For the simple reason if it came from the chute there would have been water dripping from the chute.

Q. Isn't it a fact that this was practically all water, that there was hardly any solid garbage?

A. There was garbage, yes sir.

Q. Well, how much water was there?

A. That's a pretty hard thing to guess.

Q. Was it a quarter of water and three-quarters solid garbage, or what?

A. I won't make no statement on that, because I don't know.

Q. When you looked up, when you finally got your eyes cleaned up and looked up and saw this fellow, you say it was a Chinese fellow?

A. Yes sir. [105]

Q. What kind of shoes was he wearing?

A. I don't know; I couldn't see them.

Q. You testified about the rest of his clothes?

A. Well, you've got only a little vision of a man.

Q. And you were about 60 feet away at that time?

A. Pretty close to it.

Q. You testified about this bucket you claim he was carrying?

A. Yes sir.

Q. What color was the bucket?

A. Kind of dark like.

Q. Kind of dark like?

A. Yes sir.

(Testimony of Norman R. Arthur.)

Q. What kind of handle did it have on it?

A. That's something my eyes are not good enough to see that far.

Q. Then how did you know what size the bucket was?

A. Just judging from other buckets that I have seen.

Q. This sampan that you were in, can you give us an idea of the dimensions of that boat?

A. It's a 28 foot sampan.

Q. What's the beam?

A. The beam is around five feet.

Q. And where were you standing at the time the garbage was dumped on you?

A. I was standing at the tiller of the boat.

Q. Is that one of these arm tillers, or is it a wheel?

A. No sir, it's a wheel.

Q. And how far from the stern is that wheel?

A. Around eight feet.

Q. How far from the bow? [106]

A. I don't think it's more than—it's practically right in the middle of the boat, that's what it is.

The Court: Were you standing or sitting when this occurred?

A. I was standing.

Mr. Russell: And that sampan, is that the typical fishing type of sampan we see around the harbor?

A. It is built on the fishing type, yes sir, but it has accommodations in the stern for passengers.

(Testimony of Norman R. Arthur.)

Q. As you were standing at the tiller, how far below the outside edge, the top of the outside edge of this sampan, would your feet be? Do you understand what I mean?

The Court: Well, I don't.

A. No, I don't.

Mr. Russell: Perhaps I could illustrate on this blackboard. Let us say that these are the edges of the sampan; you were standing in the center, you say?

A. No sir; the steering wheel is more over to your right.

Q. This way (indicating on diagram)?

A. More over yet, sir.

Q. This level, the deck level that you were standing on, how far is it below this edge, indicating the outside edge of the sampan, the top edge?

A. About a foot.

Q. Did you clean up this sampan after the garbage was dumped on you?

A. Yes, sir, I did.

Q. Did it personally?

A. Yes sir.

Q. How long afterwards?

A. Oh, I should say approximately 20 minutes or so afterwards. [107]

Q. Was that after you had seen the officer on the "Coolidge"?

A. Yes sir.

Q. Was this stuff splashed pretty well around in the sampan?

(Testimony of Norman R. Arthur.)

A. Yes sir, it was.

Q. I think you testified that you saw a Chinese boy walking away from the rail with a can?

A. Yes sir, I did.

Q. And how far away from the rail was he when you saw him?

A. He was only a few feet away from the railing.

Q. Didn't you say "about five feet" in your direct examination?

A. About around there, yes.

Q. And how far from the stern?

A. That I wouldn't say right off; I don't know.

Q. Did you see his face?

A. No sir, I did not.

Q. How did you know he was Chinese, then?

A. By the general garb of his clothes.

Q. In other words, it was purely a guess as to whether he was Chinese, or *haole,* or anything else?

A. No. You can tell by the general garb of his clothes and the color of his skin that he's no other nationality.

Q. What part of his skin did you see?

A. I seen his head and neck.

Q. You say you saw the color of his neck but couldn't tell the color of the can?

A. No, I can't, because it's a dark can, that's all.

Q. You testified that you changed your clothes before you went over to see anybody on the "Coolidge", is that right?

(Testimony of Norman R. Arthur.)

A. Yes sir, I did.

Q. You also testified that five minutes after this stuff was [108] dumped on your head you were on the "Coolidge"?

A. I was, yes sir.

Q. How could you proceed approximately from the stern of the "Coolidge" to the next dock, change your clothes, and get over on the "Coolidge" in five minutes?

A. Well, it can be done; if you don't think it can be done, you come down and I'll give you an illustration of how to do it.

Q. Are you sure just about the size of this bucket, the one you saw this fellow carrying?

A. Pretty sure.

Q. You're sure it was 10 gallons; isn't it a fact that it's nearer 5 gallons?

A. Well, it may have been, and may not, I won't say for sure; you know a man is not sure at that distance of a bucket.

Q. There wasn't five gallons of rubbish in your boat?

A. No; it was practically all in the harbor.

Q. And it hit you squarely on the head?

A. It hit me square on the head; and just if I hadn't acted as quickly as I did I'd have smashed Government property.

Q. If most of it was in the harbor, how did you know what it consisted of?

A. Because I picked up what was left of it on the stern of my sampan, which is a hollow pit.

(Testimony of Norman R. Arthur.)

Q. How do you know what proportion went into the harbor and what proportion went into the sampan?

A. I do not know.

Q. Could you indicate with your hands the approximate size of the container you saw the fellow carrying?

A. It looked to stand about so high (indicating).

[109]

The Court: Was it an ordinary tin pail, or was it a coal oil tin or something of that kind?

A. No sir, it was a round tin.

Mr. Russell: Will you show me that space again?

A. About so high (indicating).

Q. Indicating what—about 2½ feet?

A. No; about two feet, somewheres around there.

Q. Two feet high; and how wide?

A. That I couldn't tell.

Q. Isn't it a fact that you don't know positively whether anything went in the harbor or not; you couldn't see it, you're just guessing, aren't you?

A. What do you mean?

Q. You claim that some of this garbage went in the harbor?

A. Yes.

Q. Aren't you just guessing?

A. No, sir.

Q. How do you know?

A. I seen it with my own eyes afterwards when I was coming back to Pier 8 to go aboard; and orange peelings and cabbage does not sink, it floats.

(Testimony of Norman R. Arthur.)

Q. Where did you tie up at Pier 8?

A. I tied up at the end of the pier, by the stern of the "Coolidge"; I fastened my line to her stern line.

Q. And where was this garbage you claim came from the "Coolidge" at that time?

A. There was some on my sampan and some in the harbor there.

Q. I mean with reference to the "Coolidge", where was the stuff in the harbor?

A. It was drifting away from the "Coolidge".

[110]

Q. Drifting Ewa, or Waikiki?

A. Towards Sand Island.

Q. Straight astern, is that correct?

A. Yes sir.

Q. How far away?

A. Oh, I imagine it was about 15 or 20 feet away from the stern then.

Q. Just what did it consist of?

A. Orange peelings, celery,——

Q. Not what was on your sampan; what was in the harbor?

A. In the harbor, practically the same thing; you can't change vegetables from a sampan to the harbor.

Q. Will you enumerate the different vegetables you saw?

A. Yes, sir.

Q. Do so, then.

(Testimony of Norman R. Arthur.)

A. There was celery, orange peelings, and cabbage peelings, and tea leaves.

Q. You don't know whether they came from the "Coolidge" or not, do you?

A. I do.

Q. How; you couldn't see at the time you were hit?

A. There wasn't an airplane flying over my head to dump it?

Q. Isn't it possible that could have come from another ship?

A. It could not have.

The Court: Was there any other ship lying in that proximity?

A. No sir.

Mr. Russell: There was no ship at Pier 9?

A. There was the Coast Guard ship, yes sir.

Q. How about Pier 10 and Pier 11?

A. I don't remember that now. [111]

Q. After you went on board the "Coolidge" did you see this Chinese fellow who, you claim, was carrying the bucket?

A. I did afterwards, yes sir.

Q. How do you know it was the same one?

A. Well, I wouldn't say it was exactly the same one, but just from the general garb of his clothes; if it had've been the same one I'd have put him under arrest right then.

Q. If it had been?

A. Yes sir.

(Testimony of Norman R. Arthur.)

Q. Then you don't know whether it was the same one or not?

A. No sir.

Mr. Russell: No further questions.

Redirect Examination

By J. F. McLaughlin, Esq.:

Q. At the time, Mr. Arthur, that this rubbish landed on you and part of your sampan you say you were rounding the counter of the "President Coolidge"?

A. Yes sir.

Q. What do you mean by the "counter" of the "President Coolidge"?

A. Well, on a boat you got the stern of the boat, and the stern of the boat has a flare to it, and we call that a counter.

The Court: It projects out over the water for a certain distance?

A. Yes sir.

Mr. McLaughlin: And with reference to that counter, were you underneath it?

A. I wasn't clear underneath, no sir; I was going right by the stern of the boat, I just had cut by the counter with the bow of my boat, just cut under; I wasn't clear [112] under the counter, no sir.

The Court: Had you been under the counter, or were you going under the counter?

A. I was just passing the stern of the boat, sir.

The Court: Well, had you gone underneath the counter, or were you emerging from the counter?

(Testimony of Norman R. Arthur.)

A. I had just started to come out, yes sir.

The Court: You had been under the counter and you had just started to come out, is that right?

A. Yes sir.

Mr. McLaughlin: And it was at that point of time that you were hit with this rubbish?

A. Yes sir.

Q. Now, with reference to this individual whom you say you saw shortly thereafter walking on the deck with a pail, garbed in clothes indicative of his being a Chinese person, you say you didn't see his face?

A. No sir, I didn't.

Q. And by that statement do you mean that you didn't see the front view of his face?

A. No sir, because he was walking away from me.

Q. As he was walking on that occasion did you see one side of his face?

A. No, I can't remember that; I just seen from his back, that's all I seen; he was walking away from me toward the bulkhead there.

Q. When you said that when you were making the investigation on the "President Coolidge" with the chief mate that if this individual whom you saw had been the individual that [113] threw the rubbish over you'd have arrested him, just what did you mean by that?

A. I'd have gone to my superiors and they would have got the man and put him under arrest for doing that offense.

(Testimony of Norman R. Arthur.)

Q. Well, with reference to the person's identity, why weren't you sure that this was the same individual that you had seen walking away with the pail in his hand?

A. Because there's so many of them aboard that are dressed in the same kind of clothes, that's why; you can't identify a man by that way.

Q. But did this particular man have on the same type of garments as the man you had seen walking away with the pail?

A. Yes sir.

Q. Are you familiar with the garments of Chinese employees who work on ships?

A. Yes sir.

Mr. McLaughlin: That is all.

The Court: No further questions, gentlemen?

Mr. Russell: I believe not, Your Honor.

The Court: You'll be excused, Mr. Arthur.

PHILIP D. FUNTES

being first duly sworn as a witness for the Libellant, testified as follows:

Direct Examination

By J. F. McLaughlin, Esq.:

Q. Your full name, please?

A. Philip D. Funtes.

Q. And what is your occupation at the present time?

(Testimony of Philip D. Funtes.)

A. United States Coast Guard.

Q. And you are connected with what Coast Guard vessel? [114]

A. 838, patrol boat.

Q. Were you a member of the Coast Guard of the United States on August 26, 1937?

A. Yes.

Q. Were you connected with this same Coast Guard boat on that date?

A. Yes.

Q. On August 26, 1937, in the forenoon of that day, where was this Coast Guard boat 838?

A. It was tied up at Pier 7.

Q. For what purpose was it tied up at Pier 7, if you know?

The Court: Here in Honolulu harbor?

A. Yes sir.

Mr. McLaughlin: For what purpose was it tied up at Pier 7 in Honolulu harbor?

A. To prevent smuggling and throwing things over the side.

Q. Were you on duty in the forenoon of this day?

A. Yes.

Q. What were your duties?

A. My duty was to watch that nothing was thrown overboard from the "President Coolidge" from the bow to the stern.

Q. And for the discharge of that duty where were you stationed on this occasion?

(Testimony of Philip D. Funtes.)

A. At the present moment I was right about pretty near to the stern; I was walking down——

Q. The stern of your Coast Guard vessel?

A. She was tied up down at the end.

Q. At the end of Pier 7?

A. Yes.

Q. On this date, August 26, 1937, the forenoon thereof, [115] while you were discharging your duties as a Coast Guard employee, did you see anything thrown from the stern of the "President Coolidge"?

A. Before or after he was hit?

Q. Well, did you see anything thrown?

A. No, I didn't see anything.

Q. Did you see Mr. Arthur on that day, in the forenoon of that day?

A. Well, I seen him a couple of times running up and down before that.

The Court: Before what; what are you talking about?

A. Before that time, before 9:30.

Mr. McLaughlin: Did you see Mr. Arthur within the vicinity of the steamship "President Coolidge" on that day?

A. Yes sir, I did.

Q. And while he was in the vicinity of the "President Coolidge" did you see him hit with anything?

A. Yes sir.

Q. Will you describe that, please?

(Testimony of Philip D. Funtes.)

A. While he was coming towards this way and he was right underneath the stern, some garbage was dumped on him.

Q. Did you see it actually hit him?

A. Yes sir.

Q. Did he thereafter have a conversation with you?

A. Well, when the stuff was dumped on him the boat swerved into the pier and he was wiping the stuff off, and I had to laugh about it, and he came over to me and asked me if I had seen it, and I said I did; he asked me if I wanted to be a witness; I said "Sure".

Mr. McLaughlin: You may cross-examine. [116]

The Court: What time does this ship leave here on schedule this afternoon?

Mr. Bowman: Six o'clock.

The Court: I hope we'll get through as quickly as we can.

Cross Examination

By J. P. Russell, Esq.:

Q. Mr. Funtes, will you tell us again just what you were doing on this morning in question just before this happened?

A. Well, my duty was to watch that nothing was thrown over the side, like packages or something like opium, or something like that.

Q. Off the "Coolidge"?

A. Off the "Coolidge".

(Testimony of Philip D. Funtes.)

Q. And didn't you testify when first asked by counsel that you did not see anything thrown from the "Coolidge"?

A. Before that, yes sir, I didn't see anything thrown over.

Q. But you did see something hit Mr. Arthur?

A. Yes sir.

Q. Well now, when was the first time that you looked over towards Arthur?

A. Well, I was looking direct at him when he was coming.

Q. How does it happen you did see this garbage hit him and yet not see it thrown?

A. Well, I wasn't watching the deck.

The Court: You're twisting him there, Mr. Russell; I didn't so understand the witness; I'm sure you don't want to be unfair; but just let the witness tell in his own words, if you don't object, as to what he did see and when.

Mr. Russell: Will you describe in more detail just what you did see from the time you first saw this sampan appear [117] near the stern of the "Coolidge"?

A. You mean the man's boat?

Q. Yes; take it up in detail.

A. Well, from where I was standing I couldn't see it until he came right direct on the stern, then I was watching him, so everything was timed; as soon as he was on the stern, down came the garbage, everything was timed so right; I wasn't watching the top deck, I was watching at him.

(Testimony of Philip D. Funtes.)

The Court: Did you see where the garbage came from, Mr. Funtes?

A. It came over the rail; it must have come over the rail.

The Court: You saw that, did you?

A. Yes sir.

The Court: You saw it descend, seen it coming down?

A. I seen it coming half-way down.

Mr. Russell: Did you look up to see where it came from after you saw it coming down?

A. No sir.

Q. You weren't interested in that?

A. No sir.

Q. Did it land right square on his head?

A. Yes sir.

Q. About how much garbage was there, do you remember?

A. Well, about half a bucket, maybe more.

Q. And what size bucket, would you say?

A. I can't tell you.

Q. Did it look like about a gallon of garbage, or more near five gallons?

A. Well, I wasn't in this boat and I couldn't describe how much garbage there was.

Q. You didn't see any garbage in the water, did you? [118]

A. No, from where I was standing I couldn't see it.

Q. When he came over in his boat was there quite a bit of garbage in it?

(Testimony of Philip D. Funtes.)

A. Well, there was quite a bit in it; he was still cleaning the garbage off of him.

Q. And how long did he remain tied up near you?

A. Oh, say about 50 seconds; he asked me if I would be a witness; I said, "Sure"; then he turned around and went around the corner, and I didn't see him after that.

Q. Around which corner?

A. Around the "Coolidge"; the "Coolidge" sticks away out and I couldn't see through.

Q. Did he change his clothes while he was tied up near you?

A. Not while I was there.

The Court: Was he tied up; is there any evidence to that effect?

Mr. Russell: I'm not sure.

Q. I mean; while he was talking to you, he didn't change his clothes?

A. He couldn't be talking to me and changing his clothes; I didn't see it.

Q. He asked you to be a witness?

A. He asked me if I had seen the garbage, and I said "Sure".

Q. Then he asked you to be a witness?

A. Yes sir.

Q. Did he say what for?

A. Well, I knew what for.

Q. You knew what for?

A. Yes sir.

(Testimony of Philip D. Funtes.)

Q. Did you pay any more attention to the event after he had [119] disappeared around the stern of the "Coolidge", did you watch the rear deck of the "Coolidge" at all?

A. No sir; I walked up forward then.

Q. What kind of a day was it; was it windy that day, or calm?

A. Well, I can't remember; I can't tell the days; some days is windy, some days is calm; I know the harbor was calm.

Q. Did you talk to anybody about this before you testified?

A. Well, I told the skipper of my boat.

Q. Any one else?

The Court: Who is the skipper on your boat?

A. Gordon Gernhart.

The Court: What's his rank?

A. First class bo's'n's mate, sir.

The Court: Bo's'n's mate?

A. First class.

Mr. Russell: Did you talk with Mr. McLaughlin about this before the trial?

A. No sir.

The Court: (indicating): This gentleman here, this lawyer?

A. Yes sir, I did; I was called up to the office.

Mr. Russell: No further questions.

Mr. McLaughlin: That's all. That's the case for the Government.

(Recess—11:55 a. m. to 2:33 p. m.)

Mr. McLaughlin: Ready for the Government.

Mr. Bowman: Ready for the Libellee.

(Testimony of Philip D. Funtes.)

The Court: All right; proceed.

Mr. Bowman: Before proceeding with our case, may we at this time move to dismiss the Libel. It isn't necessary that [120] we argue it if the Court doesn't care to listen.

Our grounds are: (1) That there's no evidence that the vessel was used or employed in the violation of the Act. Those are the terms used in the Act, "used or employed", that the vessel was "used or employed", then it is the subject of the fine, assuming that the facts have been proven. The second ground of the motion is that there is no evidence that any refuse was thrown, discharged, and deposited from or out of the vessel into the navigable waters. Our contention is that the evidence is insufficient for a Court to find that there was a discharge into navigable waters.

The Court: What does that ground contemplate, Mr. Bowman: that the water where the alleged throwing of refuse occurred was not navigable water, or——

Mr. Bowman: No; that there was not a discharge into any waters; there was a discharge upon a person and into a boat; and, believing the testimony of one witness that he saw some refuse floating around in the water some 20 feet away from the "Coolidge", there's been no identification of that refuse with refuse which was alleged to have been thrown from the vicinity of a deck on the "President Coolidge".

(Testimony of Philip D. Funtes.)

The Court: Yes, I get the point you make; but the question in my mind was whether you were making a claim that this had not been shown to be navigable water.

Mr. Bowman: We can concede that.

The Court: Is the port of Honolulu, the harbor itself, necessarily as you say conceded to be navigable water?

Mr. Bowman: Yes. I'll not argue the point further, unless the Government desires to present its side of the case at this time. [121]

The Court: The Court doesn't desire to hear argument on the motion, Mr. McLaughlin; it isn't necessary. The Court will deny the motion on the ground that the Government has established by the evidence a prima facie case against the defendant.

Mr. Bowman: And may we have an exception.

The Court: Exception will be noted.

Mr. Bowman: I'll proceed with the Libellee's case, then, and call as my first witness Mr. Gjedsted.

CHARLES BROOK GJEDSTED

being first duly sworn as a witness for the Libellee, testified as follows:

Direct Examination

By A. G. Bowman, Esq.:

Mr. Bowman: Before starting an examination of this witness I'd like to correct the statement; I'm calling him as our second witness.

(Testimony of Charles Brook Gjedsted.)

The Court: Yes; that will not be used against you in the trial.

Mr. Bowman: I merely wanted to correct the statement I made.

Q. What is your name?

A. Charles Brook Gjedsted.

Q. And your residence?

A. Is in the United States, on the West Coast of the United States, California.

Q. And what is your present occupation?

A. Third Officer of the "President Coolidge".

Q. And what license do you hold?

A. Second Mate.

Q. And how long have you held the latter license?

A. Since April, 1936. [122]

Q. How long have you been on the "President Coolidge"?

A. Since March, 1937.

Q. And you have been on the "Coolidge" from then up to the present time?

A. Yes.

Q. In what capacity?

A. Third Officer.

Q. And your employer is the Dollar Steamship Company?

A. It is.

Q. And how long have you been in their employ?

A. Since 1930.

Q. On board ship since then, the entire time?

(Testimony of Charles Brook Gjedsted.)

A. Yes.

Q. In different capacities?

A. Yes.

Q. As Third Officer on the "Coolidge" what are your duties?

A. Do you want my duties in port, or at sea?

Q. In port will serve the purposes of this examination.

A. Well, I am in general charge of the deck between the hours of 8 a. m. and noon, and 8 p. m. and midnight, unloading cargo and general welfare of the ship, excepting in the engine room.

Q. And you receive instructions and orders from what superior officers?

A. The Captain, through the Chief Officer.

Q. Do you recall when the "President Coolidge" was in port on August 26, 1937?

A. According to the log books it was, yes.

Q. In the port of Honolulu?

A. Yes. [123]

Q. And you're familiar with the fact that a libel has been filed against the ship by the United States, charging that refuse was thrown from the ship on that day into the harbor?

A. Yes.

Q. When did you first hear of the libel?

A. March 15, 1938, at 10 a. m.

Q. That was some time after the event occurred?

A. Two days ago, yes.

Q. Are you familiar with the rules and regulations, if any, concerning the dumping of garbage?

(Testimony of Charles Brook Gjedsted.)

A. Yes; there's a general rule, a Company order, that there should be no garbage dumped over the side in the harbor limits of any port.

Q. How long has that been in force?

A. As long as I have been in the Company.

Q. How are the orders put in force?

The Court: I can't hear you.

Mr. Bowman: What method is used in putting these instructions in force on the ship?

A. Well, they are passed by word of mouth to the Chinese and the American citizens on ship, and they are posted in notices on places where they'll do the most good, in galleys, near the slop chute, in two languages, English and Cantonese Chinese.

Q. And have you seen the notices posted?

A. I have.

Q. And were they posted on August 26, 1937?

A. Well, they've been posted, as I say, since I've been on the ship, since 1930.

The Court: You mean, ever since you were on the ship? [124]

A. On the ships; I have been on five or six ships; they all have them.

Mr. Bowman: Are there any other provisions, or regulations, with respect to the discharge of garbage?

A. Well, as I said, they are general orders.

Q. Anything in addition that you're familiar with?

A. Of course, we're told when we come on the ship as officers, we're given instructions in a num-

(Testimony of Charles Brook Gjedsted.)

ber of things, and that's one of them, that there should be no garbage dumped over the side.

Q. And you were on board the "Coolidge" on August 26, 1937, in the forenoon, after the ship arrived here?

A. I was on watch.

Q. Did you throw anything overboard?

A. No.

Q. Did you order any refuse to be thrown overboard?

A. No.

Q. Do you know whether anybody on the ship ordered any refuse to be thrown overboard?

A. No.

The Court: You do know, or you do not know; what did you mean by that?

A. I do not know of ordering any refuse to be thrown overboard.

Mr. Bowman: Do you know of your own knowledge whether anybody on the ship did throw anything overboard on that morning?

A. No.

The Court: That question and the answer are susceptible of different meanings. You asked him if he knows and he says "No"; does that mean he doesn't know, or that so far as [125] he knows nobody did throw anything over? I don't know what you do mean.

A. Well, I don't know of anyone ordering anything to be thrown overboard, no.

(Testimony of Charles Brook Gjedsted.)

The Court: Whether any refuse actually was thrown overboard, do you or do you not know?

A. No, I do not know.

The Court: That's what I was trying to get at.

Mr. Bowman: Did you see any refuse in the harbor in and about the "President Coolidge" on that morning, that was August 8th, 1937?

The Court: August 26th, was it not?

Mr. Bowman: Or on August 26th?

A. I do not remember. I have been in and out of Honolulu about ten times, but I don't remember of seeing any, no.

Q. On August 26, 1937, who was the Chief Officer?

A. Mr. Collins.

Q. Do you know where he is now?

A. He's Master of the "President Harrison".

Q. And do you know where he lives?

A. To the best of my knowledge—that is, at least five years ago he was a resident of California.

Mr. Bowman: That's all.

Mr. McLaughlin: No questions.

The Court: Thank you. You'll be excused, sir, if you have other business to take you outside. Perhaps if the evidence of this next witness is cumulative, or largely along the same lines, it may be stipulated that the witness would testify—there's no use calling a half dozen witnesses who testify to the same facts that the Third Officer did, it seems to me. [126]

Mr. Bowman: The Second Officer would testify to the same facts as the Third Officer. Mr. Holler is the Second Officer whom I just called.

The Court: Would it be stipulated, Mr. McLaughlin, that if sworn as a witness this witness would testify to substantially the same facts that the Third Officer had already testified to?

Mr. McLaughlin: Yes, Your Honor.

The Court: Does that meet the necessities of the case?

Mr. Bowman: Yes, in this instance it would.

The Court: What is your full name, please?

A. Dennis S. Holler.

The Court: So stipulated; and the stipulation will be noted of record. I think that'll do away with the necessity of your being interrogated, Mr. Holler.

Mr. Bowman: My next witness is Mr. Wood, and I might advise the Court that his testimony would be in effect the same as that of the preceding witnesses.

Mr. McLaughlin: I'll stipulate that the record may so show.

The Court: What is Mr. Wood's capacity aboard ship?

Mr. Wood: First Officer.

The Court: First Officer at the present time?

A. Yes.

The Court: In other words, you succeeded Mr. Collins?

A. No.

The Court: Anyway, you're in the same position now that he held?

A. No; he was Chief Officer, and I am First Officer at the present time.

Mr. Bowman: The Chief Officer is in between the Master and the First Officer. [127]

The Court: I see.

Mr. Bowman: And Mr. Wood was the——

Mr. Wood: First Officer of the "President Coolidge" at that time, junior to Mr. Collins who was at the time Chief Officer.

The Court: Well, of course, so far as substantially testified to by the Third Officer, it may be admitted, if it is so admitted, that this witness would testify to practically the same set of facts. The Third Officer testified that he was actually on duty at the time and had the watch; of course that would not be true as to this officer because there are not usually two officers on watch at the same time.

Mr. Bowman: That's true.

The Court: And the Captain testified, of course, that he wasn't on the ship, that he was off the ship most of the day.

Mr. Bowman: The testimony which I wanted from these witnesses pertains to the general rules and regulations and the posting of notices, and similar testimony.

Mr. McLaughlin: If it would simplify matters at all, I'm willing to stipulate that the Steamship Company and the Captain both issued instructions which were posted about the ship to the effect that while in port no rubbish should be thrown overboard; would that meet your requirements?

The Court: And further, the last witness testified that this order was given by word of mouth to the Chinese and Americans.

Mr. McLaughlin: Yes, I'll even include that in my stipulation if it's desired.

Mr. Bowman: I would not want to stipulate as to any witness [128] other than the two who were last called. I have the Chief Steward, whose testimony I desire.

The Court: Well, you'll be permitted to call him to the stand; but as to Mr. Wood,——

Mr. Bowman: Perhaps as to this gentleman, we might agree that he would testify that the Company had instructed, that the Captain gave instructions to the effect that no rubbish should be dumped overboard while the vessel was in port, and that notices to that effect were posted, and that word was passed by word of mouth in addition, and that he did not order refuse to be thrown overboard.

Mr. McLaughlin: Yes.

Mr. Bowman: And had no knowledge of any refuse being thrown overboard.

Mr. McLaughlin: Yes.

Mr. Bowman: And, so far as he knows, refuse wasn't thrown overboard by anybody on the ship.

Mr. McLaughlin: All right.

The Court: That stipulation will be entered of record here; it's understood that Mr. Wood would so testify if called and sworn as a witness.

Reporter: What is your name, please?

A. Frank John Wood, recently of San Francisco, California.

Mr. Bowman: My next witness is Mr. Dougan, the Chief Engineer. His testimony will be substantially the same as the others, with additional facts which I wish to bring out.

The Court: The Court doesn't see any good purpose to be subserved by piling this evidence, cumulative evidence, one witness after the other, when it's not even disputed; counsel has stipulated. [129]

Mr. Bowman: I have authority for the proposition that we must by officers on board the ship make a showing, and that's a duty resting upon us,——

The Court: It seems to me you've made the showing——

Mr. Bowman: (continuing): by each officer, not one or two, but by all, so that there is no outlet for——

The Court: Proceed if you so desire; I'm trying to save time.

Mr. McLaughlin: May I suggest that I would be willing to stipulate as to each the same as I stipulated as to Mr. Wood, and that you can begin questioning from that point on.

Mr. Bowman: That will be satisfactory.

The Court: So understood. Call the Chief Engineer.

WILLIAM ALLEN DOUGAN

being first duly sworn as a witness for the Libellee, testified as follows:

Direct Examination

By A. G. Bowman, Esq.:

Q. Your name, please?

A. William Allen Dougan.

Q. You are now Chief Engineer on the "President Coolidge" and were such on August 26th, 1937?

A. Yes.

Q. And have been for a considerable length of time?

A. Yes.

Q. In your department what provisions are there with respect to disposal of refuse?

A. In the engine-room we have containers for such refuse as oily rags; and then of course all other refuse, which would be brickwork or maybe pieces of machinery, as a rule is taken out on the dock when we're in the home port; but that's about [130] all the refuse that we have from the engine-room.

Q. And the instructions in that respect?

A. We have circular letters of course that there'll be no refuse dumped in any waters or inland harbors.

Q. Did you bring a circular letter with you?

A. I have a circular letter with me, yes, that I showed you this morning.

Q. Do you have that with you now?

A. Yes sir.

(Testimony of William Allen Dougan.)

Q. Could I see it?

(Witness hands document to counsel)

A. It's one of the many of which we receive.

Mr. McLaughlin: Mr. Bowman, would it be at all helpful if I would stipulate that this rubbish didn't come from the engine-room?

Mr. Bowman: I wanted to get this document in evidence——

The Court: Show it to Mr. McLaughlin.

(Counsel complies)

The Court: Will counsel state generally what that letter is. It's just a copy of these instructions that have been heretofore testified to, issued by the Dollar Steamship Company to the effect that no rubbish or garbage shall be dumped overboard into the harbor where the vessel may be lying?

Mr. Bowman: Yes; and attached to it—I'm introducing the copy just made under the directions of the witness this morning; he wishes to keep the original, he has no copy of that; and I have attached to the copy the notice which was attached to the original circular; and I at this time wish to offer in evidence the copy which the witness has——

The Court: Copy of an original order that was issued by the [131] Company, is that correct?

Mr. Bowman: Yes.

The Court: Signed by whom?

Mr. Bowman: J. L. Lounsberry, of the Dollar Steamship Lines; and this is the original circular,

(Testimony of William Allen Dougan.)

the only one the Engineer had; I wanted to bring out the fact that there have been similar instructions sent to him subsequently.

The Court: Any objection to the copy being received instead of the original, Mr. McLaughlin?

Mr. McLaughlin: No objection.

The Court: The copy that is offered in evidence will be received and marked——

Clerk: "Libellee's Exhibit No. 1."

The Court: And is it stipulated that that is a copy of an old regulation and that there have been later regulations issued to the same effect?

Witness: Your Honor, may I ask a question?

The Court: Certainly.

Witness: The only reason I wish to retain this, it shows that I have instructed each of my officers, and I want to keep some sort of a record.

The Court: Yes, that's perfectly all right.

Mr. Bowman: Mr. Dougan, will you state briefly the nature of these instructions and, further, as to whether or not they have been issued subsequently and continuously by the Steamship Company?

The Court: I understood that was stipulated, a part of the stipulation. Counsel is being ultra careful, it seems to me, in getting perhaps unnecessary matters before the Court in so many different phases. [132]

Mr. Bowman: If it's unnecessary, then I'll withdraw the question.

The Court: Is it so stipulated, Mr. McLaughlin?

(Testimony of William Allen Dougan.)

Mr. McLaughlin: Yes, Your Honor. I thought perhaps it might be a little different instructions, and I didn't know the purpose of it.

The Court: The stipulation is of record.

Mr. Bowman: Now, Mr. Bowman, as Chief Engineer of the "Coolidge" you are familiar with the plan of the ship and its build and the outside surface of the ship, are you?

A. Yes.

Q. Will you explain or describe the aft of the ship, that is, the counter?

A. On the blackboard?

Q. Briefly, yes.

A. (sketching on blackboard): This is the deck where the garbage was presumed to be thrown over, and this would represent the water-line here; there's a sort of fin comes out——

The Court: I didn't get that.

A. A fin, called a "shark's fin" in naval construction, and from this height here to the water-line is 28 feet, and from this point parallel to here is 23 feet.

Mr. Bowman: That's the testimony I wanted.

The Court: Can you point out to me approximately where the galley would be located there on that diagram you've made; that refuse chute is in the aft part of the ship, is it not, right near the stern of the ship?

A. Yes sir; that is, one the galleys is there.

The Court: You heard the testimony this morn-

(Testimony of William Allen Dougan.)

ing of the [133] witnesses who said that certain refuse was thrown overboard from the stern of the ship, did you not, Mr. Dougan?

A. Yes sir.

The Court: Well, how far is the galley from that point the witness indicated as the point where the garbage was dumped or was thrown over?

A. Probably 25 feet.

The Court: How many galleys are there aboard ship?

A. Three.

The Court: Well, which particular one is this?

A. This would be the steerage galley.

The Court: For the steerage passengers and crew?

A. Chinese crew.

The Court: Chinese crew and steerage?

A. Chinese crew and steerage.

The Court: And in August of last year was that manned by Chinese help?

A. As far as I know, it was all Chinese help.

The Court: At that time?

A. Yes sir.

The Court: Cooks, stewards, white boys, and all?

A. Well, there may have been white supervision back there, I don't know; it's not in my department.

The Court: To the best of your observation, then?

(Testimony of William Allen Dougan.)

A. Chinese.

The Court: All right; that's all.

Mr. Bowman: One further question. Can you tell us where the rudderpost is?

(Witness sketches)

Q. And what is the distance from the rudderpost to a line [134] representing a drop from the port most aft on the ship?

A. 35 feet.

Mr. Bowman: That's all.

Mr. McLaughlin: No questions.

Mr. Bowman: My next witness is Mr. Bissel.

ALAN L. BISSEL

being first duly sworn as a witness for the Libellee, testified as follows:

Direct Examination

By A. G. Bowman, Esq.:

Q. What is your name, please?

A. Alan J. Bissel.

Q. And where do you reside?

A. San Francisco.

Q. What is your present occupation?

A. Chief Steward on the "President Coolidge".

Q. And you were such on August 26, 1937?

A. Yes.

Q. And how long have you been Chief Steward on the "Coolidge"?

(Testimony of Alan L. Bissel.)

A. Since August 14th.

Q. Of what year?

A. 1937.

Q. The Dollar Steamship Lines is your employer?

A. Yes.

Q. And how long have you been employed by the Steamship Company?

A. Since February 5th, of 1937.

Q. And from whom do you receive your instructions?

A. From the Port Steward and by circular letters from the Port Steward; at sea, from the Captain. [135]

Q. Do you have your records with you?

A. Circular letter file book, yes.

The Court: Is this the same as the other letter, Mr. Bowman?

Mr. Bowman: It's different; this is a circular letter directed to the Chief Steward on board the ship.

The Court: From the Port Steward, or what?

Witness: Yes, from the Port Steward.

Mr. Bowman: This is a copy of the original which is in Mr. Bissel's book; the United States Attorney has no objection to it going in evidence.

Mr. McLaughlin: That is correct.

The Court: Without objection—are you offering it in evidence; that would be a preliminary.

Mr. Bowman: I offer it in evidence.

(Testimony of Alan L. Bissel.)

The Court: It will be received as Libellee's Exhibit 2, without objection. Will you indicate just the general nature of that instruction; I take it it's about the—along the same lines as the other, is it not?

Mr. Bowman: He is familiar with the facts, more so than the others.

The Court: Well, let him tell it. That instruction relates to the throwing of refuse into the harbor, does it, Mr. Bissel?

A. Yes, refuse and garbage.

The Court: Enjoining upon you and your department not to throw refuse into the waters of the port where you may be lying?

A. Yes sir, at two different times.

The Court: It is signed "O. H. Smith"; who is O. H. Smith?

A. Port Steward.

The Court: In San Francisco? [136]

The Court: The Port Steward is considered to be and is the head of the stewards' department in all ships that are out at sea, and so forth?

A. Yes.

Mr. Bowman: Have you received similar instructions from time to time?

A. Yes; there are two here in this book and in another one that is not here that I know of that are out over a period of five years regarding the matter.

Q. What are your duties as Chief Steward, in brief?

(Testimony of Alan L. Bissel.)

A. In charge of the catering, general housekeeping and cuisine of the whole ship, both passengers and crew.

Q. And how many persons are under you?

A. 237.

The Court: You have general charge of the galley, the kitchen, as well.

A. The rooms and the crew quarters and stores.

The Court: I mean the cooks, the chefs, they come under your department too, do they?

A. Yes.

Mr. Bowman: The "President Coolidge" was in the port of Honolulu on August 26, 1937?

A. Yes.

Q. And you're familiar with the fact that libel has been filed against the ship?

A. Yes.

Q. Regarding the deposition of garbage?

A. I heard that it was, the afternoon that we sailed.

The Court: That you sailed from San Francisco?

A. That we sailed from here. [137]

The Court: Oh, the day that it occurred, the dumping of the refuse?

A. Yes.

Mr. Bowman: You say you learned on that day?

A. Yes.

Q. How did you learn of it?

A. The Purser told me.

Q. What did you do as a result of hearing?

(Testimony of Alan L. Bissel.)

A. There wasn't anything I could do, as I had already made the investigation in the morning regarding the dumping of the garbage—or the alleged dumping.

Mr. Bowman: Well, that's the fact I wanted to bring out, not the fact of the libel, but the fact that there was——

The Court: Well, ask the question, please.

Mr. Bowman: I'll withdraw that.

Q. When did you first hear of the alleged dumping?

A. About 10 to 10:30 on the morning of the 26th the Chief Officer came along to my room and told me.

Q. And what did you then do?

A. I immediately went aft where it was supposed to be dumped and looked, and I could see no garbage in the harbor or in the water around there. I questioned the cooks and the Chinese boys that were there, and sent for Number One boy and had him go all through the department asking all the Chinese boys; you see, a lot of those boys don't savvy much if they don't want to.

The Court: He was speaking in Chinese?

A. To the Chinese.

The Court: You don't understand Chinese, do you?

A. No sir. I was speaking in English to the Number One boy. [138]

(Testimony of Alan L. Bissel.)

The Court: I say, the Number One boy went around and spoke Chinese to the people who were working under his general charge?

A. Yes.

The Court: And you didn't understand what he said, of course?

A. No, not in speaking Chinese. I also asked all of my mess boys, of which we have 12 on the ship that have occasion to dump garbage from their messrooms after meals; they are white boys; and they had not dumped any or seen any dumped or heard of any being dumped. The same information I got from the steerage galley gang when I asked them personally.

Mr. Bowman: Is the Number One Chinese boy on the ship now?

A. No.

Q. Where is he, do you know?

A. He got off in Hongkong this time; we put off all our Orientals there.

Q. You have no Chinese on board now?

A. Only Chinese-American citizens.

Q. Did you order anything to be thrown overboard?

A. No.

Q. Are you familiar with any rules and regulations of the Company with respect to the dumping of garbage?

A. Yes.

(Testimony of Alan L. Bissel.)

Q. And what are they?

The Court: That's all been gone into so often; won't it be stipulated——

Mr. McLaughlin: We can stipulate as to the rules.

The Court: You've had at least six or eight witnesses testify to these regulations and the posting of the orders and so forth. Will it be stipulated that this witness would [139] testify to the same general effect?

Mr. McLaughlin: Yes, Your Honor.

Mr. Bowman: If the Court please, I'd like to offer in evidence through this witness a copy of the notice which is posted. I didn't wish the stipulation to cover that phase of the case.

Q. Do you have a notice that is posted on the ship? (Witness hands counsel a framed document under glass)

Q. I now show you what purports to be a notice. Will you look at that and tell us what it is?

A. It's a notice put out by the Company, printed in both English and Chinese, and posted at our garbage chutes where garbage might be thrown overboard, to the effect that it is strictly against Company rules to throw slops or refuse overboard during the vessel's stay in port. "Any deviation from these instructions will be severely dealt with." Signed "Dollar Steamship Lines, Inc., Ltd."

The Court: You were reading from the top portion of that, that's in the English language?

(Testimony of Alan L. Bissel.)

A. Yes sir. Of course this in Chinese I don't know.

The Court: Of course in Chinese you don't know one character from another?

A. No.

The Court: You're assuming that the bottom part of that notice is the same as the top portion?

A. Yes. As the instructions are in the book to the Steward to have them printed in both English and Chinese. These were printed before I came on the ship.

Mr. Bowman: Where are those notices posted? [140]

A. In close proximity to all garbage chutes.

Q. And you have personal knowledge of that?

A. Yes.

Mr. Bowman: (After exhibiting notice to opposing counsel): I offer this notice in evidence as Libellee's Exhibit 3.

The Court: Any objection?

Mr. McLaughlin: No objection, Your Honor.

The Court: It will be received without objection and marked

("Libellee's Exhibit No. 3")

Mr. Bowman: In order not to encumber the record I might read this into the record, the English, unless the Court would desire to have a translation made of the Chinese,——

The Court: I have no desire. I wouldn't desire in the matter one way or the other; you're in charge of the proof.

(Testimony of Alan L. Bissel.)

Mr. McLaughlin: I am willing to stipulate that I'll take your word for the fact, or the witness' word for the fact that, as far as he knows, the Chinese says what the English says.

The Court: Is that stipulation satisfactory?

Mr. Bowman: Yes, that's satisfactory. And may I now read into the record the notice in English?

The Court: If you so desire. You're withdrawing that——

Mr. Bowman: I'm withdrawing that——

The Court: That offer of the document in evidence——

Mr. Bowman: And reading the same into the record.

The Court: Well, go ahead; proceed.

Mr. Bowman: (reading):

> "Do not throw garbage or refuse overboard while in port. It is strictly against Company rules to throw slops or refuse overboard during a vessel's stay in port. Any deviation from these instructions will be [141] severely dealt with.
>
> Dollar Steamship Lines, Inc., Ltd."

The Court: It is stipulated, as I understand that the Chinese characters underneath that English are practically to the same effect.

Mr. McLaughlin: Convey the same meaning.

The Court: That the witness would so testify if a witness were called—an expert.

Mr. McLaughlin: Yes, Your Honor.

(Testimony of Alan L. Bissel.)

Mr. Bowman: Before the ship's arrival in Honolulu on August 26th, 1937, did you carry out any instructions personally with respect to garbage disposal?

A. Yes; the locking of the garbage chutes in the galley is always in charge of the chef; and the night before, I instructed him to see that they were locked the first thing in the morning before entering port; also, the one in the crew galley is in the charge of the third steward; I instructed him to do the same thing. The first thing next morning before entering port I went around to see that they were locked——

The Court: Well, were they locked?

A. Yes, and they were locked. I also told the third steward and the different department heads to warn their mess boys and their cooks regarding throwing garbage overboard in port, which we make it customary to do in entering every port.

Mr. Bowman: After you were notified of the alleged dumping did you re-inspect the garbage chutes?

A. Yes; after going back aft to the Chinese galley where the dumping is supposed to have taken place, I tried to find out as mentioned a few minutes ago; and then went down to make sure that the chutes were still locked in the [142] galley which they were.

Mr. Bowman: All chutes?

A. Yes.

(Testimony of Alan L. Bissel.)

Q. You stated that after receiving notice of the alleged dumping you went aft on the ship?

A. Yes.

Q. What did you find there with respect to containers, or the like, for garbage disposal?

A. Well, the usual garbage containers were there which we have in port; there were five or six drums at that time; two of them were empty, one had about a quarter full, one about three-quarters full, and one about half-full; so there was no reason to throw any garbage over the side because of the lack of containers.

The Court: That's a matter of argument, Mr. Bissell; you can simply state the facts.

Mr. Bowman: How large were the containers?

A. Oh, I would say they were about a 40 gallon drum.

Q. And whereabouts were those situated? You might show us on the diagram.

The Court: I don't think it need be marked.

A. They stood right here.

The Court: Indicating, on the first diagram that was drawn, just along the extreme stern of the ship.

A. Yes.

The Court: On what deck is that?

A. "B" deck aft.

Mr. Bowman: And you inspected those drums yourself?

A. Yes.

(Testimony of Alan L. Bissel.)

Q. On that day?

A. Yes. [143]

Q. Did you yourself throw any refuse overboard?

A. No.

Q. And did anybody to your knowledge order any refuse to be thrown overboard?

A. No.

Q. And to your knowledge was any refuse thrown overboard?

A. Do I know of any garbage being thrown overboard?

Q. Of your own personal knowledge, do you know whether or not any garbage was thrown overboard that day?

A. No, only that Mr. Collins told me——

The Court: Well, never mind what Mr. Collins told you.

A. No, I don't.

The Court: You don't know whether garbage was thrown overboard or not, is that your answer?

A. Yes sir.

Mr. Bowman: With respect to the Chinese boys, do you know whether or not they were instructed to deposit garbage in the receptacles provided on "B" deck?

A. They receive their instructions from Number One boy to that effect, besides these notices being posted in Chinese for them to read.

Q. And is there a notice on "B" deck aft?

(Testimony of Alan L. Bissel.)

A. Yes, in the galley, right where they keep their garbage; the garbage can sets right inside the galley door, that's used in the galley, and right over this door and the other door is this sign.

Q. The notice being the same one which was read into the record?

A. Yes; they're all uniform. [144]

Q. When you went aft on the ship after hearing of the alleged dumping did you inspect the water in the vicinity of the aft part of the ship?

A. I looked over the rail where Mr. Collins told me that the garbage——

The Court: By "the water" you mean the ocean?

Mr. Bowman: In the harbor, yes.

A. I looked over the rail at the place where Mr. Collins said that the garbage had been dumped.

Q. Did you see anything in the water?

A. No.

Q. What time was that, approximately?

A. About 10:30; between 10 and 10:30, I can't be sure; it was after 10:15 in the morning.

Q. In the morning of August 26th, 1937?

A. Yes.

Mr. Bowman: That's all.

Mr. McLaughlin: No questions.

The Court: That's all; you'll be excused, Mr. Bissel. Any other witnesses?

Mr. Bowman: No other witnesses. I have a deposition which I wish to introduce in evidence.

The Court: There were certain objections that were made during the course of the taking of the

deposition; I don't know whether they are insisted on or will be at this time renewed, I have no way of knowing. I have read the deposition, by Mr. Dale E. Collins, who was then the Chief Officer.

Mr. McLaughlin: May it please the Court, I have looked at this deposition in the Clerk's office some months ago; [145] I'm not too familiar with it at this moment, but perhaps if I had a few minutes to look it over I might agree that it go in without objection.

The Court: The Court will take a ten minute recess while Mr. McLaughlin familiarizes himself with the contents of that deposition.

(Recess—3:10 to 3:25 p. m.)

The Court: Does counsel wish to present argument in this matter?

Mr. McLaughlin: At the conclusion of the evidence I believe both counsel will; I know I will.

The Court: I guess we have the deposition yet to be introduced. Do you want to read that now, Mr. Bowman, or has Mr. McLaughlin——

Mr. Bowman: I offer a deposition taken on behalf of the Libellee, of the testimony of Dale E. Collins, formerly Chief Officer on the "President Coolidge",——

The Court: I've read the deposition as stated, I'm familiar with its contents. Any objection on the part of the United States?

Mr. McLaughlin: It being my understanding that the entire deposition is offered and not just part of it, I have no objection to its being received,

and as to the objections recorded in there made by an assistant United States Attorney in New York, on behalf of the Government I'll waive those objections.

The Court: On the statement of the United States Attorney, the deposition as a whole will be received in evidence and marked——

Clerk: "Libellee's Exhibit No. 3." [146]

The Court: And Mr. McLaughlin on behalf of the Government waives the objections that were noted by the representative of the United States Government who was present at the time of the taking of the deposition.

Mr. Bowman: The customary procedure, as I understand it, is to read the deposition at this time. I understand the Court has already read——

The Court: I have read the deposition.

Mr. Bowman: I don't know that it's necessary take the time of the Court——

The Court: I think I'm familiar with it; it's largely along the same lines and in accord with the evidence that's been offered here today, in fact, many of the points are practically the same.

Mr. McLaughlin: As to any right that I might have to have it read before the Court at this time, I'm willing to waive such right.

The Court: With that understanding the deposition will be received in evidence and to be considered by the Court as in evidence.

Mr. Bowman: The Libellee rests.

Mr. McLaughlin: The Government has no further evidence.

The Court: It's now 3:27; it seems to me that a very brief argument here would perhaps suffice. The Court has listened very carefully to the evidence from the stand here and has also read the deposition. How long a time would you suggest for argument?

Mr. McLaughlin: I think as far as Libellant is concerned we can cover the matter in about 10 or 15 minutes.

The Court: Would counsel be content to have the argument to [147] a side limited to 15 minutes, then?

Mr. Bowman: That would be satisfactory.

The Court: All right. Plaintiff will open; and the defendant to time his opening and closing as he sees fit.

Mr. McLaughlin: (Argument) * * *

The Court: Just one question before you begin your argument.

Mr. Russell: Do you contend or do you conceive it to be a defense to this charge here that the act, if it was committed, was committed in opposition to certain regulations of the Company or against certain instructions issued by the officers of the Company; or is that simply a matter that may be considered by the Court, perhaps, in mitigation to some extent?

Mr. Bowman: We feel that that matter is brought up before the Court to show that the steamship is not liable for the Act, that the vessel was not used or employed in a violation of the Act, not

merely because there were instructions and the like on the part of the Steamship Company, but because of those instructions in addition to the orders, the orders issued by the men in charge of the vessel, that there was absolutely no authorization for this act, that it was an act which was not within the scope of the employment of anybody on the vessel. (Argument) * * *

Mr. McLaughlin: (Argument) * * *

The Court: Under the facts in this case, I feel and so find that there has been a technical violation of this Act. I do not believe that it is a violation of such a serious nature as to require the infliction, we'll say, of the maximum penalty. I do believe that the words used in Sec. 412 of the Act must be construed in connection with the other provisions of the Act. Section 407 does not contain those [148] words; it simply makes it a misdemeanor, an offense, to dump refuse or to throw refuse into a harbor or navigable stream, navigable waters of the United States.

From the evidence in this case the Court finds that some person from the deck of the Steamship "President Coolidge" threw this refuse on to the head or part of it of the witness who occupied the stand here, the Government inspector, and that part of the rubbish—it doesn't appear what amount—went into the navigable waters of the United States; that also appears from the testimony of the witness, the inspector—what was his name——

Mr. McLaughlin: Arthur.

The Court: Arthur, yes. The Coast Guard man testified that he saw this rubbish descending from the deck of the ship when it was half-way down from the deck of the ship until the time it struck the head of Arthur; he didn't pretend to know how much if any went into the navigable waters. I am convinced the purpose of the Act and intent of the lawmakers was to keep the channels free and clear of all refuse and debris of any kind. There is a separate section of the Act here which relates to logs and lumber and articles of a large and more dangerous description, but there is no doubt in my mind that it was intended to apply to any form of refuse. The amount of the refuse might grow greater and greater on each successive occasion.

The Court finds from the facts that a technical violation of the Act has been committed, and finds the defendant guilty in this case. It is the judgment and sentence of the Court—or, rather, this being——

Mr. McLaughlin: An admiralty matter. [149]

The Court: This being an Admiralty matter, it is the decree of the Court that the defendant pay the minimum fine provided by statute, to wit, the amount of $500.00, which is hereby assessed against it, together with the costs of this case.

Mr. Bowman: May we have an exception to the decision and decree of the Court.

The Court: Exception will be noted.

Mr. Bowman: And hereby give notice of our intention of appeal.

The Court: Exception noted; and the notice of appeal, of course, will be followed up in the usual manner provided by statute.

I hereby certify the foregoing to be a full and accurate transcript of my shorthand notes in the above entitled matter.

(s) OLAF OSWALD
Official Court Reporter [150]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD ON APPEAL

United States of America,
Territory of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing pages, numbered from 1 to 150 inclusive, to be a true and complete transcript of the record and proceedings had in said court in the above-entitled cause, as the same remains of record and on file in my office and I further certify that I am attaching hereto the original citation on appeal and that the costs of the foregoing transcript of record are $6 and that said amount has been charged by me in my account against the United States.

In testimony whereof, I have hereto set my hand and affixed the seal of said Court this 16th day of May, A. D. 1938.

[Seal] WM. F. THOMPSON, JR.,
Clerk,
U. S. District Court, Territory of Hawaii **[151]**

[Endorsed]: No. 8846. United States Circuit Court of Appeals for the Ninth Circuit. Dollar Steamship Company, Claimant of, and the Steamship "President Coolidge" her engines, boilers, machinery, tackle, apparel and furniture, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court for the Territory of Hawaii.

Filed May 24, 1938.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8846

United States Circuit Court of Appeals

For the Ninth Circuit

DOLLAR STEAMSHIP COMPANY, Claimant of, and the STEAMSHIP "PRESIDENT COOLIDGE" her engines, boilers, machinery, tackle, apparel and furniture,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF FOR APPELLANT

On appeal from the United States District Court, for the Territory of Hawaii.

THOMPSON, WOOD & RUSSELL
Inter-Island Building
Honolulu, T. H.

Proctors for Appellants.

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No. 8846

United States Circuit Court of Appeals

For the Ninth Circuit

DOLLAR STEAMSHIP COMPANY, Claimant of, and the STEAMSHIP "PRESIDENT COOLIDGE" her engines, boilers, machinery, tackle, apparel and furniture,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

On appeal from the United States District Court, for the Territory of Hawaii.

I

JURISDICTIONAL FACTS

This cause of action arises upon a libel in rem filed in admiralty on August 26th, 1937, in the District Court of the United States in and for the District and Territory of Hawaii, by the United States of America against the Steamship "President Coolidge," her en-

gines, boilers, machinery, tackle, apparel and furniture, and is a libel of information for an alleged violation of *sections 407, 411 and 412, Title 33, U. S. C.* The libel is set forth on *pages 4-6* of the record.

On September 3, 1937, there was filed in the District Court of the United States in and for the District and Territory of Hawaii, a Claim of Agent on Behalf of Owner, in which the Dollar Steamship Lines, Incorporated, Limited, made claim that it was the owner of the Steamship "President Coolidge," her engines, etc., and prayed to defend accordingly (*pp. 11-13 of the record*).

It was admitted that the District Court of the United States of America had jurisdiction of this cause of action by reason of the jurisdiction in admiralty conferred upon it by *Article III, section 2 of the United States Constitution, and sub-section 3 of section 41 of Title 28, U. S. C.*

A decree was rendered by the Honorable Edward M. Watson, Judge of the District Court of the United States in and for the District and Territory of Hawaii, on the 21st day of March, 1938, in favor of the libellant and against the libellee, awarding the libellant the sum of FIVE HUNDRED DOLLARS ($500.00), together with all costs of the suit, which were taxed in the sum of THIRTY-SEVEN DOLLARS AND SIXTY-FIVE CENTS ($37.65), as a penalty for the alleged violation by libellee of *sections 407, 411 and 412, Title 33, U. S. C.* (*p. 20 of the record*).

On April 1st, 1938, the tenth day following the rendition of the decree, a Notice of and Motion for Appeal, was filed by the libellee (*p. 23 of the record*). On the same day an Assignment of Errors was filed (*pp. 24-26 of the record*). Thereupon an Order Allowing Appeal was signed by the Honorable E. M. Watson, Judge of

the United States District Court in and for the District and Territory of Hawaii (*pp. 27-28 of the record*).

A Citation on Appeal was issued to the United States of America and to Ingram M. Stainback, United States Attorney for the Territory of Hawaii, on April 1, 1938 (*pp. 28-29 of the record*).

On April 1, 1938, the same day as the allowance of the appeal, an appeal bond was filed by the libellee indemnifying the United States of America for the sum of TWO HUNDRED FIFTY DOLLARS ($250.00). On April 1st, likewise, a supersedeas bond indemnifying the United States of America, in the sum of ONE THOUSAND DOLLARS ($1,000.00) was filed, and on April 5, 1938, a praecipe was filed (*pp. 29-30 of the record*).

This Court, the Circuit Court of the United States for the Ninth Circuit, has jurisdiction of this appeal by virtue of section 86 (*d*) of the Organic Act of the Territory of Hawaii, reading:

> "Appeals from the said district court shall be had and allowed to the Circuit Court of Appeals for the Ninth Judicial Circuit in the same manner as appeals are allowed from circuit courts to circuit courts of appeal as provided by law, and appeals may be taken to the Supreme Court of the United States from said district court in cases where appeals are allowed from the district courts and circuit courts of the United States to the Supreme Court, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, removal of causes, and other matters, and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts

of the United States and the courts of the Territory of Hawaii." (March 3, 1905, 33 Sts. at L. c. 1465, s. 3; March 3, 1909, 35 Sts. at L. c. 269, s. 1; July 9, 1921, 42 Sts. at L. c. 42, s. 313; February 12, 1925, 43 Sts. at L. 890, c. 220; December 13, 1926, 44 Sts. at L. 919, c. 6, s. 1; 28 U. S. C. A. 345; 48 U. S. C. A. 641-645.)

II

STATEMENT OF CASE

The steamship "President Coolidge" is a steam vessel engaged in the carriage of passengers and freight between ports on the western coast of the United States and ports in the Orient with stopovers in Honolulu, City and County of Honolulu, Territory of Hawaii. She is owned by The Dollar Steamship Lines, Incorporated, Limited, which has its principal place of business in the City and County of San Francisco, State of California.

On the 26th day of August, 1937, the steamship "President Coolidge" was lying in the port of Honolulu, City and County of Honolulu, Territory of Hawaii. Shortly after she had docked one Norman R. Arthur, a boatman hired by the United States Engineer, while engaged in his duties of patrolling the harbor, cut under the counter of the steamship "President Coolidge" so that he was within six feet of the rudder post and with quite an overhang above him (*pp. 71-74 of the record*). While passing under the stern, a bucket of refuse in some way fell or was thrown upon Arthur. After cleansing the refuse from himself and changing clothes, Arthur immediately went aboard the "Presi-

dent Coolidge," to ascertain what had happened (*pp. 80-81 of the record*). Accompanied by the chief officer of the vessel Arthur and the officer questioned several employees of the vessel who were stationed at the stern but all denied any knowledge of the mishap (*p. 81 of the record*). Arthur testified that after cleaning the slop out of his eyes, he saw what he designated as "a Chinese" walking back from the rail of the vessel carrying a bucket but when he went aboard he failed to identify the person (*pp. 77-78, 94 of the record*).

Libellee's defense rested upon the testimony of several of the officers on the vessel. They all testified that they had no knowledge of any refuse being dumped overboard and had given strict orders to all employees on the vessel that no refuse of any kind was to be dumped in any harbor (*pp. 44-52, 106-133 of the record*). It was also testified, and several exhibits were admitted to show, that printed instructions in both English and Chinese were posted in conspicuous places on the vessel to the effect that no refuse was ever to be dumped while in a harbor (*pp. 37, 39, 41, 129 of the record*). The government does not contend that any officer of the company ordered the refuse to be dumped or had any knowledge of it being dumped, nor does it deny that numerous notices concerning dumping of refuse were posted on the ship. (*See Stipulation of counsel for the libellant on pp. 112, 115 of the record.)*

This appeal presents two issues, one a question of fact and the other a question of law.

It is the contention of the libellee on the issue of fact that the District Court erred in finding from the evidence, that there was any garbage thrown into the navigable waters of Honolulu Harbor.

Upon the point of law, it is the contention of the libellee that the District Court erred in holding that the steamship "President Coolidge" was a vessel "used or employed" in violation of *33 U. S. Code, sec. 407,* within the meaning of *33 U. S. Code, sec. 412.*

Both questions were first raised by the pleadings in the answer of the libellee. The libel alleges in article 2:

> "That said vessel on the 26th day of August, 1937, while in the navigable waters of the United States, to wit, Honolulu Harbor, Territory of Hawaii, was used and employed in violating the provisions of section 407 of Title 33 of the United States Code in the following manner, to wit, that during the forenoon of said date, at the place aforesaid, refuse matter, to wit, garbage consisting of celery, oranges, tea leaves, etc., was thrown, discharged and deposited from or out of said vessel into the navigable waters of the United States, to wit, Honolulu Harbor, Territory of Hawaii" (*pp. 4-5 of the record*).

Paragraph II of the answer denies the allegations of article 2 of the libel (*p. 14 of the record*). Both points were also raised at the close of the libellant's case upon oral motion by libellee to dismiss the libel (*pp. 105-106 of the record*).

III

SPECIFICATION OF ASSIGNED ERRORS TO BE RELIED UPON

All the assigned errors consisting of numbers 1 to 9 inclusive, are relied upon.

IV

ARGUMENT

IN ORDER TO CONSTITUTE A VIOLATION OF SECTION 407 U. S. CODE, TITLE 33, THERE MUST BE EVIDENCE THAT REFUSE MATTER WAS THROWN INTO THE NAVIGABLE WATERS OF THE UNITED STATES, AND THE FALLING OF REFUSE MATTER INTO A BOAT DOES NOT CONSTITUTE A THROWING INTO NAVIGABLE WATERS.

Sutherland on Statutory Construction, p. 439, *sec.* 350; 59 *C. J.* 1118, 1119.

THE THROWING OF REFUSE MATTER INTO THE NAVIGABLE WATERS OF HONOLULU HARBOR BY SOMEONE, CONTRARY TO EXPRESS ORDERS AND REGULATIONS PROMULGATED BY THE OWNERS OF A VESSEL AND THE OFFICERS OF THE VESSEL AND WITHOUT ANY KNOWLEDGE OF SAID ACT BY THE OWNERS OR OFFICERS, DOES NOT CONSTITUTE A VESSEL BEING "USED OR EMPLOYED" IN VIOLATION OF 33 U. S. CODE, SECTION 407, WITHIN THE MEANING OF 33 U. S. CODE, SECTION 412.

United States v. The Anjer Head, 46 *Fed.* 664;

The Colombo, 28 *Fed.* (2d) 1004-5;

The J. Rich Steers, (*C.C.A.* 2) 228 *Fed.* 319;

The Pile Driver No. 2, 239 *Fed.,* 491;

The Emperor, 49 *Fed.* 752;

United States vs. Carroll Oil Terminals, Inc., 18 *Fed. Supp.* 1008;

The Watuppa, 19 *Fed. Supp.* 493;

The Albania, 30 *Fed.* (2d) 727;

Cunard S. S. Co., Limited, v. Stranahan, 134 *Fed.* 318;

The Bombay, 46 *Fed.* 665; 1 *Words & Phrases, Vol.* 8, *p.* 7229;

Shawnee Nat'l Bank v. United States, 249 *Fed.,* 583; 59 *C. J.* 1110, 1115, 1117;

The Scow No. 9, 152 *Fed.* 548;

The Scow No. 36, 144 *Fed.,* 932;

Jaycox v. United States, 107 *Fed.* 938;

Sutherland on Statutory Construction, p. 438, *sec.* 349;

United States v. 1150½ *Pounds of Celluloid,* 82 *Fed.,* 627, 634;

In re United States v. 84 *Boxes of Sugar,* 8 *L. Ed.* 749, 7 *Peters,* 462;

Huntington v. Attril, 146 *U. S.* 657, 36 *L. Ed.,* 1123;

In re M'Donough, 49 *Fed.,* 360;

United States vs. Various Tugs and Scows, 225 *Fed.* 506;

Compagnie Francaise de Navigation a Vapeur v. Elting, Collector of Customs, 19 *Fed.* (2) 773;

Hecht v. Malley, 68 *L. Ed.,* 949, 265 *U. S.* 144;

In re Cargo of the Ship Favourite, 2 *L. Ed.* 643, 4 *Cranch,* 347;

25 *R. C. L.* 1086;

16 *C. J.* 76;

25 *C. J.* 1205;

Chaffee v. U. S. 21 *L. Ed.* 908, 85 *U. S.* 516;

State v. Adams Express Co., 87 *N. E.* 712 *(Ind.);*

Barber Asphalt Paving Co. v. Peck, 186 *Mo.* 506; 85 *S. W.* 387;

Pilots v. Vanderbilt, 31 *N. Y.* 265;

Tenement House Bd., of Supervision v. Schlechter, 83 *N. J. L.* 88, 83 *Atl.* 783;

Lindberg v. Burton, 41 *N. D.* 587, 171 *N. W.* 616;

Buckeye Engine Co. v. City of Cherokee, 54 *Okl.* 509, 153 *Pac.* 1166.

Assignment No. 1

THE COURT ERRED IN RENDERING A DECREE IN FAVOR OF THE LIBELLANT.

Assignment No. 2

THE COURT ERRED IN OVERRULING THE ORAL MOTION TO DISMISS ENTERED BY THE LIBELLEE IN THIS CAUSE.

Assignment No. 3

THE COURT ERRED IN DECREEING THAT THE LIBELLANT, THE UNITED STATES OF AMERICA, RECOVER FROM THE LIBELLEE, THE STEAMSHIP "PRESIDENT COOLIDGE," HER ENGINES, BOILERS, MACHINERY, TACKLE, APPAREL, AND FURNITURE, AS A PENALTY, THE SUM OF $500.00.

Assignment No. 4

THE COURT ERRED IN ORDERING THAT THE LIBELLANT, THE UNITED STATES OF AMERICA, RECOVER FROM THE LIBELLEE, THE STEAMSHIP "PRESIDENT COOLIDGE," THE COST OF THESE PROCEEDINGS, TAXED IN THE SUM OF $37.65.

IS THE STATUTE PENAL?

Laws adopted by legislatures have, since the adoption of the first law, always been placed in one of two general classes: *penal* and *private*. The distinction between them is of a fundamental nature and many tests have been laid down whereby any law may be classified. The true test is whether the penalty is imposed for the punishment of a wrong to the public or for the redress of an injury to the individual. A very

good criteria for determining whether a law is penal or private, is laid down in *25 R. C. L. 1086,* where it is said:

> "The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual. The effect and not the form of the statute is to be considered; and if its object is clearly to inflict a punishment on a person for doing what is prohibited or failing to do what is commanded to be done, it is penal in its character."

See also *59 C. J. 1110,* where the liberal view of a penal statute is set forth:

> "In common use, however, this sense has been enlarged to include under the term 'penal statutes' all statutes which command or prohibit certain acts, and establish penalties for their violation, and even those which, without expressly prohibiting certain acts, impose a penalty upon their commission."

And in *Huntington v. Attrill, 36 L. Ed. 1123, 146 U. S. 657,* a noted case on the distinction between penal and private laws, the court adopts the above rule.

> "Penal laws, strictly and properly, are those imposing punishment for an offense committed against the State. The test whether a law is penal, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual."

In applying this test to various statutes of a similar nature to the one involved here, the courts have held them to be of a penal nature. In the case of *In re United States v. 84 Boxes of Sugar, 8 L. Ed. 745, 7 Peters, 462,* the court in construing a statute which provided for the forfeiture of certain kinds of sugar illegally imported into the United States, said at page 749:

"The statute under which these sugars were seized d condemned is a highly penal law . . ."

In *United States v. Various Tugs and Scows, 225 Fed. 506,* where a violation of the Act of June 29, 1888, (a statute similar to the one under consideration in this case) was involved, the court clearly held it to be a penal statute.

It is evident that sections *407 and 412, 33 U. S. Code* are in their very nature penal. They are statutes which provide for a recovery by the government against an individual or thing for an offense against the state. The wrong which was intended to be redressed was against the public and the penalty which may be recovered is sought by the government and is paid to the government. There is no provision for a recovery by an individual and the very terms of the statutes preclude the idea of their being of a private character.

DEGREE OF STRICTNESS AND CERTAINTY REQUIRED TO CONSTITUTE A VIOLATION OF A PENAL CODE.

A penal statute which imposes a punishment upon a person or thing for a wrong committed against the public requires a much stricter burden of proof than a private statute. From the very nature of a penal statute a conviction cannot be sustained unless the acts complained of are clearly brought within the meaning of the statute. Although as a general rule, there need be only a preponderance of the evidence to sustain a conviction, yet such evidence must clearly bring the alleged acts within the express provisions of

the statute. In *25 C. J. 1205,* the general rule is stated as follows:

> "One who claims a penalty under a statute has the burden of proving the existence of the facts entitling him to the penalty, and must bring his case clearly within the statute."

In an action to recover a penalty, the United States Supreme Court, in *Chaffee v. United States, 21 L. Ed. 908, 85 U. S. 516,* said:

> "In an action to recover a statutory penalty, it is error for the court to instruct the jury, in substance, that the government need only prove that the defendants were presumptively guilty, and the duty thereupon developed upon them to establish their innocence, and if they did not, they were guilty beyond a reasonable doubt."

In *State v. Adams Express Co., 87 N. E. 712,* it is stated:

> "One can be subjected to statutory penalties only under the express provisions of the statute, and not by implication or construction."

See also:

Barber Asphalt Paving Co. v. Peck, 186 *Mo.,* 506, 85 *S. W.* 387;

Pilots v. Vanderbilt, 31 *N. Y.* 265;

Tenement House Bd. of Supervision v. Schlechter, 83 *N. J. L.* 88, 83 *Atl.* 783;

Lindberg v. Burton, 41 *N. D.* 587, 171 *N. W.* 616;

Buckeye Engine Co. v. City of Cherokee, 54 *Okl.* 509, 153 *Pac.* 1166.

Assignment No. 5

THE COURT ERRED IN FINDING AS A FACT FROM THE EVIDENCE PRESENTED THAT ON AUGUST 26th, 1937, THERE WAS THROWN FROM THE STEAMSHIP "PRESIDENT COOLIDGE" INTO THE NAVIGABLE WATERS OF HONOLULU HARBOR GARBAGE CONSISTING IN PART OF ORANGE SKINS, CELERY AND TEA LEAVES.

Assignment No. 6

THE COURT ERRED IN NOT FINDING AS A SPECIAL FINDING OF FACT THAT THE REFUSE THROWN FROM THE STEAMSHIP "PRESIDENT COOLIDGE" FELL ENTIRELY UPON THE WITNESS, ARTHUR, AND IN THE BOAT OPERATED BY HIM AND THAT, THEREFORE, NONE OF THE SAID REFUSE MATTER WAS THROWN INTO THE NAVIGABLE WATERS OF HONOLULU HARBOR.

At the close of the government's case in the lower court, the sufficiency of the proof necessary to sustain a violation of *section 407, Title 33, U. S. Code,* was squarely presented. Counsel for the libellee stated (*p. 105 of the record*) :

> "Before proceeding with our case, may we at this time move to dismiss the libel.... The second ground of the motion is that there is no evidence that any refuse was thrown, discharged, and deposited from or out of the vessel into the navigable waters ... that there was not a discharge into any waters; there was a discharge upon a person and into a boat; and, believing the testimony of one witness that he saw some refuse floating around in the water some 20 feet away from the 'Coolidge,' there's been no identification of

that refuse with refuse which was alleged to have been thrown from the vicinity of a deck on the 'President Coolidge.' "

The lower court dismissed the motion merely observing that the government had established by the evidence a *prima facie* case against the libellee. It is the contention of the libellee that there was not sufficient evidence to establish even a *prima facie* case against libellee.

The government placed on the stand in support of its libel of information only two witnesses, one Norman R. Arthur, a harbor patrolman, who, as such, was entitled to a portion of all fines imposed when he discovered a violation of the law, and the other, Philip D. Funtes, a member of the United States Coast Guard. The testimony of Funtes can be disregarded at the very outset as far as concerns his witnessing any of the refuse being in the waters of Honolulu Harbor. He testified that he saw some garbage descending about half way down the stern of the vessel and that he saw the garbage hit Mr. Arthur square on his head. He also testified that there was quite a bit of garbage in Arthur's boat, (*Rec. p. 102*), but as to whether any garbage landed in the water he did not know:

"*Q.* You didn't see any garbage in the water did you?

A. No, from where I was standing I couldn't see it."

Thus, it clearly appears that as far as the witness Funtes is concerned, his testimony does not show a violation of the statute. In fact, his testimony bears out the contention of the libellee that if any garbage was thrown or fell from the "President Coolidge," it landed in the boat of Arthur and not in the waters.

Norman R. Arthur also testified for the government. He is a government employee and in the event a penalty is imposed in this case will be entitled to a one-half share of the amount levied. His testimony discloses that his feelings were hurt and that he was quite annoyed at having refuse dumped on his head. In addition to his manifest interest in the outcome of the suit, because of his contingent interest in any fine, his testimony shows that he was a greatly prejudiced witness. It is obvious that much of his testimony was as to what he *wanted* to see rather than what he *actually* saw. He testified that when the refuse lit on him it blinded him for at least a half minute and that as soon as his eyes cleared he glanced up at the boat. At this point Arthur testified as follows:

"*Q.* And after your vision became clear did you look toward the 'President Coolidge'?

A. Yes, sir, I did.

Q. And what did you see?

A. I seen one fellow up there walk away with a can; he was carrying a can . . .

THE COURT: Seen one what?

A. One Chinese fellow, sir.

THE COURT: All right; go ahead.

MR. McLAUGHLIN: And what was he doing?

A. All I seen him do, he was just walking; he had come from the stern of the boat" (a mere conclusion unsupported by anything) "and was walking over towards the cabins or whatever they call them.

. . . . .

MR. McLAUGHLIN: You say this individual that you saw at that time employed on the 'President Coolidge' was a Chinese individual?

A. Yes, sir.
Q. How was he attired, if you know?
A. As far as I could see, the upper half of him was a black shirt, and it's a little like a blue workshirt the pants he had on" (*pp. 77-78 of the record*).

On cross-examination, the following was further brought to light, concerning the alleged person at the stern of the vessel:

"*Q.* When you looked up, when you finally got your eyes cleaned up and looked up and saw this fellow, you say it was a Chinese fellow?
A. Yes sir.
Q. What kind of shoes was he wearing?
A. I don't know; I couldn't see them.
Q. You testified about the rest of his clothes?
A. Well, you've got only a little vision of a man.
Q. And you were about 60 feet away at that time?
A. Pretty close to it.
Q. You testified about this bucket you claim he was carrying?
A. Yes sir.
Q. What color was the bucket?
A. Kind of dark like.
Q. Kind of dark like?
A. Yes sir.

. . . . .

Q. I think you testified that you saw a Chinese boy walking away from the rail with a can?
A. Yes sir, I did.
Q. And how far away from the rail was he when you saw him?
A. He was only a few feet away from the railing.
Q. Didn't you say 'about five feet' in your direct examination?
A. About around there, yes.
Q. And how far from the stern?
A. That I wouldn't say right off; I don't know.

Q. Did you see his face?
A. No sir, I did not.
Q. How did you know he was Chinese, then?
A. By the general garb of his clothes.
Q. In other words, it was purely a guess as to whether he was Chinese, or haole, or anything else?
A. No. You can tell by the general garb of his clothes and the color of his skin that he's no other nationality.
Q. What part of his skin did you see?
A. I seen his head and neck.
Q. You say you saw the color of his neck but couldn't tell the color of the can?
A. No, I can't because it's a dark can, that's all."

(*pp. 87, 90 of the record.*)

This was the only testimony of any kind offered by the government to connect in any way the throwing of the garbage by an employee of the vessel. Giving the greatest weight possible to Arthur's testimony, there is not a particle of evidence showing that it was an employee of the "President Coolidge" or anyone in any way connected with her, who was responsible for the alleged act. Arthur's statement that the person he saw was employed on the "President Coolidge" is a mere conclusion based on no facts within his knowledge. This is shown by his admission on cross-examination when he said:

"*Q.* After you went on board the Coolidge, did you see this Chinese fellow who, you claim, was carrying the bucket?
A. I did afterwards, yes sir.
Q. How do you know it was the same one?
A. Well, I wouldn't say it was exactly the same one, but just from the general garb of his clothes; if

it had've been the same one I'd have put him under arrest right then.

Q. If it had been?

A. Yes sir.

Q. Then you don't know whether it was the same one or not?

A. No sir." (*pp. 94-95 of the record.*)

Going even further, Arthur's testimony as to his identification of the so-called "Chinese employee" is wholly unworthy of belief. He testified on cross-examination:

"*Q.* And about how long did it take you to clean this stuff out of your eyes so that you could see?

A. Oh, I don't think it would take me over half a minute or so, just enough to wipe my eyes.

Q. I might ask it this way: Where was your boat when you finally could see?

A. I was approximately 50 to 60 feet over, maybe 50 feet from the stern of the boat.

Q. And about what speed were you traveling at that time?

A. Around eight knots.

Q. Well now, isn't it a fact that you didn't see anybody throw anything on you?

A. I did not see it, no." (*p. 86 of the record.*)

Thus, from Arthur's own testimony, he was at least 60 feet from the stern of the ship when he first looked up and due to the fact that "B" deck aft, on which he testified he saw somebody walking back, was at least 35 or 40 feet from the water line (*Testimony of Carl Albert Ahlin, p. 65 of the record*) the total distance from Arthur to "B" deck aft was over 60 feet. Not only that, but from Arthur's own testimony, his boat was proceeding at a rate of eight knots and he stated that he did not clear out his eyes for at least a half minute. A boat travelling at the rate of eight knots an hour

would in a half minute have travelled approximately 405 feet. It thus clearly appears that Arthur's testimony on how far he was from the ship, the Chinese person and the bucket, is wholly in error. And to say that at a distance of 405 feet he recognized a person as Chinese from his "head and neck" is pulling a long bow on one's credulity.

Arthur also testified that he steered his boat over to pier 7, where a Coast Guard boat was tied up, and talked with one of the members of the crew for about four or five minutes. After talking with the Coast Guardsman and changing his clothes, Arthur went aboard the "Coolidge" and conducted an investigation with the chief officer of the vessel. He testified that the refuse landed in the water but he did not explain when he saw it there, nor that any of it came from the vessel. (*Testimony of Norman R. Arthur, pp. 76-83 of the record.*)

On cross-examination it was very clearly brought out that the first time Arthur saw any garbage in the water (celery, orange peelings, and cabbage peelings and tea leaves, *p. 94 of the record*) was when he was coming from pier 7 after he had talked with the Coast Guardsman on pier 7 and was going aboard the "President Coolidge" in his clean clothes. If we adopt his theory of the time, that was at least five minutes after the alleged dumping had occurred. The best one can say for his testimony is that there was some drifting garbage about twenty feet from the stern of the "Coolidge." (*Testimony of Norman R. Arthur, pp. 92-94 of the record.*) There is no showing that the garbage had been thrown into navigable waters. There was testimony that refuse came off the "President Coolidge" and lit on the boat; and there was also testimony that

there was some refuse in the waters about twenty feet astern of the vessel, but nowhere was there any testimony, except by inference or conjecture, connecting the refuse which came off the "Coolidge" with that which another saw in the waters. He testified that there was a Coast Guard Boat at pier 7 and that he did not know whether there were any ships at piers 10 and 11. From which it will be seen that the garbage which he testified he saw in the waters might just as well have come from some other ship. (*Testimony of Norman R. Arthur, pp. 93-94 of the record.*)

It is well to remember that the libel of information was for the violation of a penal statute with a very stiff penalty which might be imposed, minimum $500, maximum $2500, (*section 411, Title 33, U. S. Code*). Where a violation of such a statute is involved, the courts have without exception strictly construed them and required very strong evidence of the acts necessary to constitute a violation. There must be proof beyond any question that the person accused did certain acts which constitute a violation of the statute and no presumptions or inferences will be sufficient.

> ". . . In order to enforce a penalty against a person, he must be brought clearly within both the spirit and the letter of the statute; and if there is a fair doubt as to whether the act charged is embraced in the prohibition, that doubt is to be resolved in favor of defendant." *59 C. J. 1118-9.*

And on the general rule of interpretation of a penal statute, it has been most aptly stated:

> "A penal statute cannot be extended by implication or construction. It cannot be made to embrace cases not within the letter, though within the reason and policy of the law. Although a case may be within the mischief intended to be remedied by a penal

act, that fact affords no sufficient reason for construing it so as to extend it to cases not within the correct and ordinary meaning of its language. . . . Penal statutes can never be extended by mere implication to either persons or things not expressly brought within their terms."

Sutherland on Statutory Construction, p. 439, sec. 350.

The libellant alleged the commission of certain acts by the libellee which if true would constitute a violation of a penal statute subjecting libellee to a penalty. In order to prove a violation the government was required to prove all necessary elements and upon the failure to prove one necessary element there was no violation. It was absolutely essential that there be a showing of refuse being thrown, discharged or deposited from the "President Coolidge" into navigable waters before there could be any liability. The government's case is built on an inference or a supposition, namely, that refuse was thrown from the vessel, therefore, it went into the waters; or that since there was refuse in the waters, it must have come from the "President Coolidge." Either supposition or inference might have been quite logical but that is not what is required to sustain a conviction under a penal statute. There must be direct proof of all acts and evidence of all elements of the violation. It is submitted that there was a complete lack of evidence showing an essential element of the violation.

On still another essential fact the government failed to show that the libellee violated the statute. There was an absolute failure to prove in any way that any person employed by the "President Coolidge" was responsible for any act of dumping any refuse into the

waters of Honolulu Harbor. As has been shown, the only attempt to so connect an employee of the "President Coolidge" was by Arthur's incredible testimony concerning a Chinese person walking back from the "stern" in one place and the "rail" in another (*pp. 77, 90, of the record.*) But assuming Arthur's testimony to be true, it did not in any way show a relation between the alleged Chinese and the dumping nor between the alleged Chinese and the vessel.

Under sections 407 and 412 it is essential to prove that someone connected with the vessel was responsible for the alleged dumping. We are being prosecuted under a penal statute which requires direct proof, not inference or supposition, of all acts essential to constitute a violation. The burden of proof is upon the government to show by a preponderance of the evidence and strict proof that the "President Coolidge" was engaged in a violation of the statute. The government has not met the measure of proof. It has not clearly brought the case within the statute. It has not only failed to establish a *prima facie* case but failed to establish any case and the lower court should have dismissed the libel at the close of libellant's case.

Assignment No. 7

THE COURT ERRED IN FINDING AS A CONCLUSION OF LAW FROM THE EVIDENCE INTRODUCED HEREIN THAT WHEN ON AUGUST 26TH, 1937, SAID REFUSE MATTER WAS THROWN FROM SAID VESSEL INTO THE NAVIGABLE WATERS OF HONOLULU HARBOR, SAID VESSEL WAS A VESSEL "USED OR EMPLOYED" IN A VIOLATION OF 33 U. S. CODE, SEC. 407 WITHIN THE MEANING OF 33 U. S. C., SECTION 412.

Assignment No. 8

THAT THE COURT ERRED IN NOT FINDING AS A CONCLUSION OF LAW FROM THE EVIDENCE INTRODUCED HEREIN THAT WHEN ON AUGUST 26TH, 1937, SAID REFUSE MATTER WAS THROWN FROM SAID VESSEL THAT SAID VESSEL WAS NOT A VESSEL "USED OR EMPLOYED" IN A VIOLATION OF 33 U. S. C., SECTION 407, WITHIN THE MEANING OF 33 U. S. C., SECTION 412.

Assignment No. 9

THAT THE COURT ERRED IN FINDING AS A CONCLUSION OF LAW FROM THE EVIDENCE INTRODUCED HEREIN THAT THE STEAMSHIP "PRESIDENT COOLIDGE" IS LIABLE FOR A PECUNIARY PENALTY IN ACCORDANCE WITH THE PROVISIONS OF 33 U. S. C., SECTION 412.

The libellee was charged with a violation of *section 407, Title 33 U. S. Code,* which provides:

> "It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind . . . any refuse matter of any kind or description whatever . . . into any navigable waters of the United States . . ."

The penalty imposed was by virtue of *section 412, Title 33, U. S. Code,* which provides:

> ". . . And any boat, vessel, scow, raft or other craft used or employed in violating any of the provisions of sections 407, 408 and 409, of this chapter shall be liable for the pecuniary penalties specified in the preceding section. . . ."

The second main ground upon which the libellee bases its contention that the lower court erred is that

the steamship "President Coolidge" was not a vessel "used or employed" in a violation of *section 407, Title 33, U. S. Code,* within the meaning of *section 412, Title 33, U. S. Code.* This issue was presented to the lower court at the close of the government's case when libellee made an oral motion to dismiss the libel. The motion was denied and the court, in its special findings of fact and conclusions of law, specifically made the finding that the "President Coolidge" was a vessel "used or employed" within the meaning of the statute (*pp. 17-18 of the record*).

One of the oldest and most well-established rules of construction is that courts will strictly construe all laws of a penal nature and will not by implication extend their meaning beyond the ordinary import of their natural import. The courts will interpret a penal statute to mean just what the legislature has said and cannot extend or enlarge any statute by judicial interpretation. This principle is so generally recognized that it is not necessary to carry this further than to cite a few authorities:

> "Hence every provision affecting any element of a criminal offense involving life or liberty is subject to the strictest interpretation . . . 'the rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislature, not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment.' "
>
> *Sutherland on Statutory Construction, p.* 438, *sec.* 349.

". . . The statute under consideration is highly penal and as such falls within the general rule which requires a strict construction. *U. S. v.* 84 *Boxes of Sugar,* 7 *Pet.* 453. We must so construe it as to carry out the obvious intention of Congress; but, being penal every case must come, not only within its letter, but within its spirit, and purpose. We must have regard to the maxim 'actus non facit reum nisi mens sit rea'; and, unless it clearly and unequivocally appears that the law maker intended a forfeiture without regard to the conduct or intent of the owner, there can be no condemnation of the claimant's property."

U. S. v. 1150½ *Pounds of Celluloid,* 82 *Fed.* 634.

"A penal statute cannot be extended by implication or construction. It cannot be made to embrace cases not within the letter, though within the reason and policy of the law. Although a case may be within the mischief intended to be remedied by a penal act, that fact affords no sufficient reason for construing it so as to extend it to cases not within the correct and ordinary meaning of its language. . . . Penal statutes can never be extended by mere implication to either persons or things not expressly brought within their terms."

Sutherland on Statutory Construction, p. 439 *sec.* 350.

". . . Under the rule of strict construction, such statutes will not be enlarged by implication or intendment beyond the fair meaning of the language used, and will not be held to include other offenses and persons than those which are clearly described and provided for, although the court may think the legislature should have made them more comprehensive."

59 *C. J.* 1115-7.

"But this is denominated a 'penal' statute, and should be strictly construed, and with a view of carry-

ing out the object aimed at by such a statute, or on the grounds of public policy, a court has no right to interpolate words into it, or to give a different meaning to words used from what are their natural import as commonly used."

In re M'Donough, 49 *Fed. Rep.* 360, 362.

It is essential that this rule of strict construction of penal statutes be kept in mind in order to arrive at a proper interpretation of the statutes involved in this case. Under the decision of the lower court, the statutes involved will place an absolute liability upon any vessel from which any refuse is thrown or discharged. The construction placed upon these statutes by the lower court precludes any requirement of knowledge on the part of the owners of the vessel or her officers. It cannot be questioned but that Congress could have, if it so desired, imposed an absolute liability upon vessels for the doing of certain acts without any requirement of knowledge or notice. But before such a liability is imposed courts hold that such intention must be clearly expressed in the statute. A statute will not be held to impose absolute liability unless from the very terms of the statute such a legislative intention is manifest. In *United States v. Various Tugs and Scows, 225 Fed., 506* (*Syl. 3*) it is said:

"A penal statute is to be construed strictly especially where a liability is imposed upon persons who may be in no way at fault."

And to the same effect are the following:

"As a general rule where an act is prohibited and made punishable by statute only, the statute is to be construed in the light of the common law and the existence of a criminal intent is to be regarded as essential, even when not in terms required. The

legislature, however, may forbid the doing of an act and make its commission criminal without regard to the intent or knowledge of the doer, and if such legislative intention appears the courts must give it effect, although the intent of the doer may have been innocent."

16 *C. J. sec.* 42, 76.

"Purpose to penalize an act innocent of intentional wrong will not be imputed to Congress, in the absence of plain language."

Compagnie Francaise de Navigation a Vapeur v. Elting, Collector of Customs, 19 *F (2d)* 773.

"The purpose is not to be imputed to Congress, in the absence of plain language, to penalize an act innocent of intentional wrong. It would be an unnecessary, and it seems to me an unwarranted, construction to read the statute as intended to subject the vessel owner to a penalty for bringing into the port an alien who has stolen his passage, and whose presence on the vessel may not have been discovered before her arrival. Such a person is not 'imported' within the ordinary meaning of penal laws."

Cunard S.S. Co. Limited v. Stranahan, 134 *Fed. Rep.* 318, 319.

It is with a consideration of the rules of construction which have heretofore been discussed that the statutes involved in this case should be interpreted. The language used in the statutes should be given their normal meaning; that is, the ordinary meaning with which such language is ordinarily associated. There should not be read into the statutes by implication any meaning which does not appear in the statutes by their express terms.

The statute under consideration says:

"It shall not be lawful to throw, discharge, or de-

posit, or cause, suffer, or procure to be thrown, discharged, or deposited . . . any refuse matter. . . ."

The ordinary and normal meaning of the language employed is that no one shall intentionally or knowingly throw, discharge, etc., any refuse matter. The very words themselves indicate that what is being sought to be remedied is the wilful throwing or discharging of refuse matter. The requirement of knowledge and the supposition of intent is inherently contained in the general meaning of the words 'throw' or 'discharge.' This interpretation is further strengthened by continuing in the phrase where it says 'cause, suffer or procure.' Such words clearly require an intent or knowledge before they can be done. Each word in its normal and ordinary sense must mean that the throwing or discharging was wilfully ordered or permitted. The two phrases when read together merely mean that first, no one himself shall knowingly do the prohibited act while secondly, that no one shall knowingly permit or suffer a third person to do the prohibited act.

Section 412 provides:

". . . any boat . . . used or employed in violating any of the provisions of sections 407. . . ."

That section must therefore be read in the light of section 407 and construed in conjunction with it. No penalty is imposed by section 412 without a violation of section 407. And as we have seen, section 407 requires that there be an intent or knowledge to do the prohibited act before any violation occurs. The words "used or employed" can only mean that before a vessel comes within their meaning, there must be some intent to do or knowledge of the prohibited act. Going even further than that, the very meaning of the words "used

or employed" contains the idea that there was an intent or knowledge. Within the ordinary meaning of those words a thing is not being used or employed in doing certain acts unless there was the intent to do such acts. In the *First Edition of Words and Phrases,* vol. 8, p. 7229, the word "used" is twice interpreted and both times is given the same meaning:

> "A fire policy provided that friction matches and camphine should not be used in the building insured. Held: that the word 'use' did not embrace a casual use of camphine and friction matches by a workman employed in the building, contrary to the orders of the assured; the use of camphine and friction matches contemplated in such clause being a use by the authority of the assured, either express or implied. Farmers' & Mechanics' Ins. Co. v. Simmons, 30 Pa. (6 Casey) 229, 303."

> " 'Used' in Act June 29, 1888, c. 496, sec. 4, 25 Statu. 209 (U. S. Comp. Stat. 1901, 3536), providing that any boat or vessel used or employed in violating any provisions of the act should be liable, etc., means to make use of, or put to a purpose. Practically the words 'used' and 'employed' are synonymous. Every boat or vessel put to the purpose of violating the provisions of the statute is liable to the penalties and to be put to such or any purpose necessarily requires antecedent determination on the part of her master or owners or of someone with sufficient authority that she shall perform such purpose. A vessel can only be used and employed by or with the consent of the person who has the legal right to use and employ."

Sections 407 and 412 must be construed in the light of an antecedent determination to do the prohibited acts before there is any violation of the statutes. This is the normal construction and there being no express

intent that no intent or knowledge is required, such elements cannot by implication be read into the statute.

Several statutes of a like character to the ones here involved have been construed and passed upon by the Federal Courts. As a result there has come into existence certain rules in regard to such statutes. A case which is almost exactly like the present case and in which a statute almost identical to that under which the present violation was alleged to have occurred, is *United States v. The Anjer Head, 46 Fed. 664.* In that case the statute under which the alleged violation was sought to be punished was the *Act of June 29, 1888 (Stats. at Large, p. 209)* which prohibited dumping in New York Harbor. It was alleged that someone on board of her did deposit ashes in the waters of the harbor, and the court in dismissing the libel said:

> ". . . The facts, as admitted, are that an employee on board the steamship did throw overboard a single scuttle of ashes at the place named. Such employee was undoubtedly technically guilty of violating the statute. But these proceedings are not against him, but are brought against the steamship, being based upon the last clause of section 4 of the statute referred to in the libel. That clause reads as follows: 'Any boat or vessel used or employed in violating any provisions of this act shall be liable,' etc. The emphatic words in this clause are 'used' and 'employed.' Practically, they are synonymous, and they mean 'to make use of,' 'to put to a purpose.' The clause in question, then, renders every boat or vessel 'put to the purpose' of violating the provisions of this statute liable to the penalties. It is quite evident that the Anjer Head was not so engaged in such violation. To be put to such or to any purpose necessarily requires antecedent determination on the part of her master or owners, or of some one with suf-

ficient authority that she shall perform such purpose. A vessel can only be used or employed by or with the consent of the person who has the legal right to use and employ. There is no pretense that there was any such use or employment in this case."

It is submitted that this case should be given great weight in interpreting the statute now under consideration. In that case, as in the present controversy, the words "used or employed" were contained in the statute and likewise the act complained of in both cases was a depositing of refuse by someone unknown to those in charge of the vessel. And just as in *The Anjer Head, supra,* the court construed the phrase "used or employed" to mean "put to a purpose" so in the instant case the identical phrase should be construed to mean an antecedent determination.

The fact that this case was brought under a different statute than that under consideration in *The Anjer Head, supra,* is not material. The present statute is merely an enlargement of a prior act of June 29, 1888, which makes it unlawful to dump or deposit any refuse in any navigable waters of the United States rather than merely in the harbor of New York City. The wording of the Acts as to what constituted a violation is similar and should be likewise similarly construed. It is a well recognized rule that courts will presume that a legislature in reenacting a statute was cognizant of and reenacted it in conformity with the construction which courts have previously placed on the statute or particular words of the statute.

"So where words or phrases employed in a new statute have been construed by the courts to have been used in a particular sense in a previous statute on the same subject, or one analogous to it, they are

presumed, in the absence of a clearly expressed intent to the contrary, to be used in the same sense in the new statute as in the previous statute."

59 *C. J. sec.* 625, 1063.

". . . In adopting the language used in an earlier act, Congress must be considered to have adopted also the construction given by this court to such language, and made it a part of the enactment."

Hecht v. Malley, 68 *L. Ed.* 949, 956.

In a more recent case where it was sought to hold a defendant liable for the discharging of refuse or oil into New York harbor in violation of *section 441, Title 33, U. S. Code,* the court said:

"Owner of oil barge from which oil leaked into waters of New York harbor held *not* guilty of violating statute prohibiting discharge of refuse, sludge, and oil into such waters, where, unknown to owner, leak in petcock or another part of barge, which was tightly moored, was caused by severe storm, since oil leaked into waters through no direct act of owner, and because of situation over which owner had no control."

United States v. Carroll Oil Terminals, Inc. 18 *F. Supp.* 1008.

Still another case in which a violation of section 441 was alleged to have occurred is *The Colombo, 28 Fed. (2d) 1004, 1005,* and the court, in dismissing the libel, said:

"It cannot be said, especially in view of the fact that the statute must be strictly construed, that a ship, into which oil is being pumped from a barge through an inlet on the ship to which a hose is connected, is being used or employed in violation of any provisions of the act, merely because a person on the barge is pumping valuable oil into the sea through a valve on

the ship which unknowingly has been left open. See the Anjer Head (D.C.) 46 F. 664. It was not intended that the ship or the barge should be used to dump oil into the harbor of New York."

The *Act of June 29, 1888,* supra, has most frequently been applied to cases dealing with vessels used primarily for the purpose of dumping refuse. In two cases, *The J. Rich Steers, 228 Fed. 319,* and *The Watuppa, 19 Fed. Supp., 493,* the situation was presented where a penalty was sought to be imposed against both a tug and a scow for improper dumping by the scow. In both cases the correct interpretation of the words "used or employed" is clearly brought out and held to mean that the vessel to be liable must have been "put to the purpose." In the *J. Rich Steers, supra,* it is said:

> "Under section 4 of the Act of June 29, 1888, as amended by Act Aug. 18, 1894, which provides that 'any boat or vessel used or employed in violating any provision of this act shall be liable to the pecuniary penalties imposed thereby,' a tug which had no other connection with the violation than that of towing the offending scow is not used or employed in such violation."

While in *The Watuppa, supra,* the court, in holding that a tug which had no connection with the dumping was not liable for a penalty, makes the statement that:

> "Counsel for the government frankly admits that libellant is in possession of no evidence which would attach any liability to the tug or her owner or tends to show willful conduct or negligence directly attributable to the Dumper E-8 or her owner."

One fact which characterizes all the decisions is that before a vessel will be held to have been "used or employed" the acts complained of must have been done at

the direction of or under the control of someone in charge of the vessel. The holding of a vessel *ipso facto* liable merely because of an act having occurred is expressly repudiated. There must be a showing that there was an antecedent determination that certain acts should be done or a directing of certain acts to be done before there is any violation of the statutes.

Applying the proper construction of sections 407 and 412 to the facts in the present case, it becomes quite evident that the "President Coolidge" was not "used or employed" in violating section 407. The government merely showed the happening of certain acts and failed completely to prove that there was any antecedent determination on anyone's part to commit the acts. The testimony of libellee's witnesses precludes the possibility that anyone in charge of the "President Coolidge" had anything to do with the dumping of refuse. The conclusion is inescapable that the acts were done without any knowledge on the part of the owners of the vessel or the officers, and contrary to the express orders and regulations of those in charge.

The Federal courts have at various times had under consideration statutes which, like the one involved in this case, have been penal in character in that they provided for the government being entitled to a fine or forfeiture upon the commission of certain prohibited acts. In all of such cases, the courts have construed the statutes strictly and have refused to impose liability unless there was some evidence showing that there was an intent to do the prohibited acts. They have refused to impose an absolute liability unless the intention of the legislature clearly appears that the mere doing of the acts would constitute a violation. In the case of *In re United States v. 84 Boxes of Sugar, 8 L. Ed. 745,*

7 *Peters, 462,* the court in construing a statute which provided for the forfeiture of certain kinds of sugar illegally imported into the United States, said at *page 749:*

> "The statute under which these sugars were seized and condemned is a highly penal law, and should, in conformity with the rule on the subject, be construed strictly. If, either through accident or mistake, the sugars were entered by a different denomination from what their quality required, a forfeiture is not incurred."

The Supreme Court, in construing a statute which provided for the forfeiture of wines and spirits where they were brought into this country without certain marks and certificates, said:

> "The court is also of opinion that the removal for which the act punishes the owner with a forfeiture of the goods must be made with his consent or connivance, or with that of some person employed or trusted by him."
>
> *In re Cargo of the Ship Favourite,* 2 *L. Ed.* 643, 648, 4 *Cranch,* 347.

A statute which provided for the forfeiture of any goods imported into this country by the means of a false invoice was involved in *United States v. 1150½ Pounds of Celluloid, 82 Fed. 627.* The court in applying the statute to a case where an employee of the owner of certain goods, had, without the owner's consent or knowledge, illegally brought certain goods into the country, said:

> "In order to enforce a forfeiture under the customs administrative act of June 10, 1890, (sec. 9) it is necessary that the acts made a ground of forfeiture shall be done by the owner, or someone for whom he

is responsible, or under whom he derives title; and goods will not be forfeited which are unlawfully brought into this country by a mere trespasser, without the knowledge of the owner or his agent, and with intent to himself appropriate the money provided by the owner for the payment of the lawful duties."

In *Cunard S. S. Co. Limited v. Stranahan, 134 Fed. 318,* the court in construing a statute making it unlawful to bring to the United States any alien afflicted with certain diseases, said:

"Section 9 of Act March 3, 1903 (32 Stat. 1215, U.S. Comp. St. Supp. 1903, p. 175) making it unlawful for any person, transportation company, etc., to bring to the United States any alien afflicted with a loathsome or with a dangerous contagious disease, and providing if it shall appear to the satisfaction of the Secretary of Commerce and Labor that any alien so brought to the United States was afflicted with such a disease, 'at the time of foreign embarkation and that the existence of such disease might have been detected by means of a competent medical examination at such time,' such person or transportation company shall pay a fine to the collector, to be enforced by withholding clearance papers from the vessel until its payment, is intended to apply only to a case where a diseased person is brought in by a vessel as a passenger or voluntarily, and when the vessel owner or transportation company has an opportunity to discover the existence of the disease by means of a medical examination before the alien is taken on board, and a vessel owner cannot be subjected to the penalty for bringing into port an alien who has stolen his passage, and whose presence on the vessel was not discovered before her sailing."

Undoubtedly certain cases will be cited as being conclusive on the statutes in question and as to their

proper construction. It might be well at this time to glance at those cases and see how they differ from the facts involved in this controversy. The first case which may be cited is *The Bombay, 46 Fed. 665,* and is a case which deals with the same statute as was construed in *The Anjer Head, supra. The Bombay* does not overrule *The Anjer Head* but is applying the statute to an entirely different factual situation. The court expressly distinguishes *The Anjer Head* decision and on page 668 lays down the true distinction, saying that such cases, referring to *The Anjer Head:*

> ". . . differ from the present, in this: that here the ashes were dumped by firemen, part of the crew of the ship, whose duty it was to clear away ashes created by the furnaces and who in dumping the ashes presumably acted under the orders of an officer of the ship, given in furtherance of the navigation of the ship. In such a case, it seems to me that the ship, so used to dump ashes in an unlawful place by persons authorized to dump her ashes, is used and employed in violating the law, within the meaning of the statute."

The true reason for imposing liability on *The Bombay* was that it appeared that the ashes were dumped by the order of someone in charge or at least there was this presumption which was not overcome. (*See p. 666,* where the court said) :

> "In this case the presumption certainly is that the ashes dumped overboard from this steamer were so dumped by order of some of the persons in authority on board the ship. Firemen do not volunteer to do labor of this character. The burden is therefore upon the ship to overcome this presumption."

And on page 668:

> "The case, then, I find to be this: that ashes were dumped in an unlawful place from the deck of an ocean steamer by her firemen, presumably acting under orders from some superior officer of the steamer; the steamer at the time being engaged in performing a freighting voyage to sea and the dumping of the ashes accumulated at her furnaces being a necessary incident to her navigation. . . ."

In the case of the "President Coolidge" the decision of the court in *The Bombay, supra,* is not at all applicable. The libellee expressly repudiated any presumption that might have obtained that the refuse was dumped by the order of someone in charge (*pp. 106-133 of the record*).

Another case is *The Scow No. 36, 144 Fed., 932,* where the same statute was alleged to have been violated as that which it is alleged was violated by the "President Coolidge." Liability was imposed but again the court is very careful to point out that the acts were done by a person in authority and one who would normally have power to do what he did. This is clearly pointed out at page 935 where the court said:

> "Another objection urged is that this is not a case where the vessel was 'used' for an unlawful purpose within the meaning of the statute. The person on board the scow was placed there by the owner, and was in charge of her, and was there for the purpose of dumping the load which she was supposed to carry in the business in which she was used and in which the owner was engaged, and while the service which the scowman was expected to perform was not performed in accordance with instructions, the wrongful act in question was in a sense within the scope of

his employment, because he was in charge of the scow for the purpose of discharging its load. At least his relation to the scow was not such as would exist in a case where a vessel, or a vehicle, had been taken without leave, and where the possession was wholly without authority and wrongful. The scowman was placed there to do the work of the owner, that of discharging the vessel's load, and under such circumstances the offending vessel should be treated as used in violation of the Act of Congress in question."

Still another decision that will undoubtedly be cited is *The Emperor, 49 Fed. 751,* which involves a tug and a scow used for dumping purposes. The libel was brought against the tug for an act of the scow in dumping refuse contrary to the orders of the captain of the tug. In applying the *Act of June 29, 1888,* supra, to such a situation, the court at page 752 clearly points out the proper meaning of the words "used or employed":

" 'Any boat or vessel used or employed in violating any provision of this act shall be liable to the pecuniary penalties imposed thereby, and may be proceeded against summarily by way of libel in any district court of the United States, having jurisdiction thereof.'

"The last sentence quoted, though forming a part of section 4, is equally applicable to all sections of the act. The previous parts of section 4 are confined exclusively to violations of section 4. The controverted question is whether the Emperor in this case was 'used or employed in violating' the act. It is urged that it should be so regarded, because by the previous language of section 4 it is provided that every person, firm or corporation engaged in removing such mud shall be 'responsible for its discharge' within the prescribed limits. It is not easy to determine what

is the intent of this section as respects the use of the word 'responsible'; for the succeeding clause of the same sentence is the only clause that enacts any penalty or consequence of violation; and that clause confines the penalty to the 'person offending,' and prescribes no punishment or fine except upon the person offending. I think the last clause is a qualification and limitation upon the 'responsibility' enacted by the previous clause, in so far at least as to prevent any conviction of an offense, or any punishment by fine, of any person who is not in some way connected by proof with the performance of the illegal act.

"The 'Emperor' in the present case was proceeding in good faith to the prescribed dumping ground. She could not reach it except by first going across the prohibited limits. There was nothing unlawful in her act or intent. Everything that she did was done in the performance of her duty to take the scows to the proper place. She was 'used and employed' for that purpose, and for no other purpose. The dumping before reaching the proper place was by no act, omission, or privity of the tug; but by the willful and criminal act of the men on the scows, wholly independent of the tug, and against the express orders of the captain. It seems to me very clear that neither the captain nor any person on board of the tug, was the 'person offending' under the previous sentence of the section 4; and that the tug was not 'used or employed' in the illegal act of the scowmen. To hold her liable would be to punish the innocent for the guilty; a result never to be reached upon any ambiguous construction of the statute, but only upon its clear and unmistakable meaning. To hold the tug, I must construe the expression used as equivalent to saying that the tug shall be liable for any violation of the act by the scow, or by those on board of the scow, while in tow of the tug; which is certainly a

very different and broader expression than that used by the statute. . . .

"The illegal act was done independently of her, and outside of the scope of her 'use and employment'; and I must, therefore, dismiss the libel."

The *Act of March 3, 1899* (*sections 407 and 412, Title 33 U. S. Code*) was construed in *The Pile Driver No. 2, 239 Fed. 489,* and liability was imposed upon the vessel for the acts of one of her crew in throwing log pile ends into the river. But on page 491, the court maintains the distinction that the other cases have laid down, and says:

"It also appears that the man who threw overboard the obstructions complained of was a member of the pile driver's crew and was acting under orders from the foreman in charge of the work. . . .

"In the present case the entire enterprise was under the direction of those in charge of the pile driver."

The case of *The Scow No. 9, 152 Fed. 548* also construed the *Act of March 3, 1899,* and held:

"Where the owners of a dumping scow placed a man in sole charge with power to dump her load, and he becoming unnecessarily alarmed at the roughness of the sea while being towed to the dumping grounds dumped a part of her load into the waters of a harbor in violation of Act March 3, 1899, c. 425, sec. 13, 30 Stat. 1152 (U. S. Comp. St. 1901, p. 3542) the scow is subject to the penalty imposed by section 16 of the act, although the action of the scowman was contrary to the orders of the owner; but the towing tug, although the property of the same owner, where the master had no reason to anticipate the violation of the statute, cannot be said to have been 'used or employed' in such violation, and is not subject to the penalty therefor."

This distinction which has been pointed out in the above cited cases is quite important and necessary to ascertain the true construction of sections 407 and 412. The distinction is that when the acts complained of were caused by someone in charge or someone whose normal duty was to do those acts and the acts were improperly performed, there will be liability. But no liability will be imposed where the acts were caused by someone over whom the person in authority had no control and had given express orders to the contrary. Applying this distinction to the "President Coolidge," it is clear that there can be no liability. At best the government merely proved that there was some refuse which came from the vessel. There was no showing who caused the act complained of. Because of the strict rule covering refuse, it is more reasonable to assume that it was done maliciously and contrary to orders or by a coolie passenger than by a member of the crew under any real or imaginary authority. According to the evidence it could as well have been done through accident as by design. On the other hand, the libellee offered evidence which showed conclusively that the acts were done without the knowledge of anyone of authority and contrary to the express rules and regulations. The government has in no way connected the person who threw the garbage, with the vessel, in any capacity.

We respectfully contend that the lower court erred in overruling the oral motion to dismiss and in rendering a decree in favor of the libellant with the resulting penalty and costs. The evidence produced by the government was insufficient to sustain an alleged violation of section 407. There was no evidence that someone in charge or someone in authority had or could be charged

with knowledge of the purported acts. There was no showing of antecedent determination on the part of some person responsible for the conduct of the boat relative to the conduct complained of.

Sections 407 and 412 do not impose absolute liability but require proof of an intention or negligence amounting to intention to do the prohibited acts. The libellant would no doubt admit that there was no showing of such intention and that there could not be a showing of such intention. Such being the situation it became the duty of the lower court to find in favor of the libellee and dismiss the libel. The mere fact that certain acts occurred does not impose a liability upon the vessel.

CONCLUSION

In conclusion, it is respectfully submitted that the decision and decree of the District Court of the United States in and for the Territory of Hawaii, were in error and must be reversed because there was a complete lack of proof showing a violation by the libellee of sections 407, 411, 412, Title 33 U. S. Code. The decree of the lower court by imposing an absolute liability places an impossible burden upon vessels which no precautionary measures can prevent—a burden never intended by Congress nor required by the statute. If we adopt the theory of the lower court there need only be a showing that refuse came from a vessel and the liability is automatically imposed. If a passenger or a trespasser throws refuse from a vessel lying in any navigable waters of the United States, the vessel, an entirely innocent instrumentality, would be liable.

As was intimated by the lower court, that is the effect of its holding. If a passenger throws overboard a

flower *lei* the fine instantly accrues against the vessel and it will destroy the colorful Hawaiian ceremony of giving flower *leis* to arriving and departing guests as no common carrier can prevent the passengers from dropping or throwing them into the harbor, and no common carrier can afford to pay $500.00 for each violation thus perpetrated.

It is submitted that Congress never intended placing such a liability upon vessels and that by the use of the words "used or employed" Congress did not intend that liability would be imposed unless there was some showing that there was an antecedent determination by someone in charge of the vessel to commit the wrongful acts. Sections 407 and 412 do not impose an absolute liability but presuppose some wrongful intent or knowledge. The government has totally failed in any way to connect the person who allegedly threw refuse overboard from the "President Coolidge" with anyone who was in any way connected with the vessel, and for that reason, the decision of the District Court should be reversed.

Dated at Honolulu, T. H., this 11th day of August, 1938.

Respectfully submitted,

DOLLAR STEAMSHIP COMPANY,
Claimant of, and the STEAMSHIP "PRESIDENT COOLIDGE," her engines, boilers, machinery, tackle, apparel and furniture,
Appellants.

By THOMPSON, WOOD & RUSSELL

F. E. Thompson

F. E. Thompson,
Their Proctors.

Due service and receipt of a copy of the within is hereby admitted this 11th day of August, 1938.

INGRAM M. STAINBACK AND
J. FRANK McLAUGHLIN,

By J. Frank McLaughlin

Proctors for Appellee

No. 8846

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DOLLAR STEAMSHIP COMPANY, Claimant of, and the STEAMSHIP "PRESIDENT COOLIDGE", her engines, boilers, machinery, tackle, apparel and furniture,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

Upon Appeal from the United States District Court for the Territory of Hawaii.

INGRAM M. STAINBACK,
United States Attorney, District of Hawaii,

J. FRANK McLAUGHLIN,
Assistant United States Attorney, District of Hawaii,

FRANK J. HENNESSY,
United States Attorney for the Northern District of California,
Post Office Building, San Francisco,

Proctors for Appellee.

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UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

Upon Appeal from the United States District Court for the Territory of Hawaii.

OPINION BELOW.

The only previous opinion rendered in this case is the oral opinion of the court below (R. 137, 138).

The court below in conformity with *Admiralty Rule* 46½ made Special Findings of Fact and Conclusions of Law (R. 17-19) and thereafter made and entered a final Decree (R. 19-21).

JURISDICTION.

This suit in admiralty was filed pursuant to the provisions of 33 *United States Code,* Sections 407, 411 and 412 (R. 4-6).

The district court had jurisdiction to entertain this suit upon the basis of 28 *U. S. C.,* Sections 41 (3) and (9).

Section 225 of Title 28, *United States Code,* confers jurisdiction upon this court to hear appellant's appeal.

STATEMENT OF CASE.

This suit in admiralty was instituted August 26, 1937, by the appellee to recover a statutory penalty (33 *U. S. C.,* Sections 411, 412) from the appellant, the Steamship "President Coolidge", because, it was alleged, she was used and employed on August 26, 1937 in Honolulu Harbor in violating Section 407 of Title 33, *United States Code,* in that refuse matter was thrown out of her into navigable water of the United States (R. 4).

The appellant, Dollar Steamship Lines, Incorporated, Limited, duly filed claim to the appellant, the Steamship "President Coolidge" (R. 11), and filed an Answer (R. 13) denying generally the material allegations of the Libel.

The case being at issue, it was tried March 17, 1938. Evidence was adduced by the parties and arguments presented. The case was submitted upon the same date and the court orally announced its Opinion and

Decision (R. 137) from the bench. It thereafter made and filed Special Findings of Fact and Conclusions of Law pursuant to *Admiralty Rule* 46½ (R. 17) and its Decree (R. 19).

Within the proper time the appellants perfected their appeal to this court.

The appellee does not accept the appellants' statement of the evidence made under the heading of "Statement of Case" (Appellants' Brief, pp. 4-5), especially in so far as it purports to be a statement of the evidence presented by appellee to the court below. This being an appeal in admiralty the evidence before the lower court is reviewable by this court. Consequently rather than to here take issue with appellants as to what the evidence was, appellee is content to let the record (R. 44-53) (R. 56-135) speak for itself.

SUMMARY OF ARGUMENT.

I.

THE LOWER COURT DID NOT ERR IN SPECIALLY FINDING AS A FACT THAT REFUSE MATTER WAS THROWN FROM THE APPELLANT, THE STEAMSHIP PRESIDENT COOLIDGE, INTO HONOLULU HARBOR.

(a) The refuse landed upon navigable water.

(b) The refuse at the ship's stern came therefrom.

(c) Liability of vessel is not dependent upon proof of who did the throwing of the refuse.

(d) Credibility of Mr. Arthur's testimony.

(e) Appellee met burden of proof of essential facts.

The Silver Palm, CCA-9, 94 F. (2) 754 (1938);
The President Madison, CCA-9, 91 F. (2) 835 (1937);
The Colombo, 28 Fed. (2) 1004; rev. CCA-2, 42 F. (2) 211 (1930);
The Gartland SS Co. v. Utah Idaho Sugar Co., CCA-7, 92 F. (2) 940 (1937);
"Scow 6-S", 250 U. S. 269, 272; 63 L. Ed. 977; 39 S. Ct. 452.

II.

THE LOWER COURT DID NOT ERR IN HOLDING AS A MATTER OF LAW THAT THE APPELLANT, THE STEAMSHIP "PRESIDENT COOLIDGE", AT THE TIME THE REFUSE MATTER WAS THROWN FROM HER, WAS A VESSEL "USED OR EMPLOYED" IN A VIOLATION OF 33 UNITED STATES CODE, SECTION 407, WITHIN THE MEANING OF 33 UNITED STATES CODE, SECTIONS 411 AND 412.

The Colombo, 28 Fed. (2) 1004; rev. CCA-2, 42 F. (2) 211 (1930);
Hegglund v. United States, CCA-5, 97 F. (2) 543 (1938);
La Merced, CCA-9, 84 F. (2) 444;
The Pile Driver No. 2, CCA-2, 239 Fed. 489;
"Scow 36", New England Dredging Co. v. United States, CCA-1, 144 Fed. 932;
United States v. The Anjer Head (D. C.), 46 Fed. 664;
The Bombay (D. C.), 46 Fed. 665;
United States v. Carrol Oil Terminals, Inc. (D. C.), 18 Fed. Supp. 1008.

ARGUMENT.

Though appellants assign and purport to rely upon the nine errors redundantly assigned (R. 24—Brief p. 6), the appellants correctly state in their brief (pp. 5 and 6) that their appeal presents but two questions—one of fact, to wit: Did the trial court err in finding as a fact that the refuse matter thrown from the appellant, the Steamship "President Coolidge", was thrown into the navigable waters of Honolulu Harbor?—and the other a question of law, to wit: Did the trial court err in holding as a matter of law that under the facts which it found that the appellant, the Steamship "President Coolidge", was "used or employed" in a violation of 33 *U. S. C.*, Section 407, within the meaning of 33 *U. S. C.*, Sections 411, 412?

These being the two questions presented by this appeal, appellee will address itself to them rather than to appellants' verbosely assigned errors to the same effect.

I.

THE LOWER COURT DID NOT ERR IN SPECIALLY FINDING AS A FACT THAT REFUSE MATTER WAS THROWN FROM THE APPELLANT, THE STEAMSHIP "PRESIDENT COOLIDGE", INTO HONOLULU HARBOR.

Appellants argue by isolating parts of appellee's evidence that not only was there insufficient evidence to permit the court to find the fact in dispute, but that, indeed, there was absolutely no evidence that the refuse thrown from the Steamship "President Cool-

idge'' landed in navigable water for, they say, the evidence is that it all landed into a boat.

The court below saw and heard the two witnesses who testified for the appellee, and who were cross-examined without avail by appellants. In its oral opinion (R. 137) the court said:

> "From the evidence in this case the Court finds that some person from the deck of the Steamship 'President Coolidge' threw this refuse on to the head or part of it of the witness who occupied the stand here, the Government inspector, and that part of the rubbish—it doesn't appear what amount—went into the navigable waters of the United States; that also appears from the testimony of the witness, the inspector—what was his name——
> Mr. McLaughlin. Arthur.
> The Court. Arthur, yes. The Coast Guard man testified that he saw this rubbish descending from the deck of the ship when it was half-way down from the deck of the ship until the time it struck the head of Arthur; he didn't pretend to know how much if any went into the navigable waters."

In its Findings the court specifically found (R. 18—Finding No. 3):

> "(3) That on August 26, 1937, there was thrown from the Steamship 'President Coolidge' into the navigable waters of said Honolulu Harbor garbage consisting in part of orange skins, celery, and tea leaves."

This appeal being in admiralty the evidence is of course open to review by this court, and while the Findings of the court below are not conclusive, they

are nevertheless presumptively correct and will not be set aside by the appellate court unless clearly wrong.

The Silver Palm, CCA-9, 94 F. (2) 754 (1938);
The President Madison, CCA-9, 91 F. (2) 835 (1937);
Gartland SS Co. v. Utah Idaho Sugar Co., CCA-7, 92 F. (2) 940 (1937).

As, however, the presumption in favor of the correctness of the Findings of the court below does not relieve this court from examining and weighing the evidence, a consideration of it in view of the factual question raised by appellants is in order.

(a)

The refuse landed upon navigable water.

Consider first appellants' contention that there was no evidence before the lower court showing that the refuse landed in navigable water.

Appellee's witness Norman R. Arthur (R. 71-97), a person employed by the United States Engineers of the War Department for the purpose of patrolling Honolulu Harbor to see that the federal laws relating thereto are observed (R. 71), testified on direct examination with reference to this point as follows:

"Mr. McLaughlin. Now, with reference to the point where you were when this material hit you, just exactly how did it hit you and of what did the material consist?

A. It hit me right squarely on the head, and consisted of—there was cabbage, orange peelings, and some celery, and tea leaves, and water.

Q. Was there any particular odor to this material?

A. Well, it smelled just like swill, to my knowledge.

Q. Did any of this material land in the water?

A. Yes sir, it all did, practically all of it except the dry rubbish aboard the boat, which stayed."

(R. 76.)

and upon cross-examination further testified:

"Q. How do you know what proportion went into the harbor and what proportion went into the sampan?

A. I do not know.

* * * * * * *

Q. Isn't it a fact that you don't know positively whether anything went in the harbor or not; you couldn't see it, you're just guessing, aren't you?

A. What do you mean?

Q. You claim that some of this garbage went in the harbor?

A. Yes.

Q. Aren't you just guessing?

A. No, sir.

Q. How do you know?

A. I seen it with my own eyes afterwards when I was coming back to Pier 8 to go aboard; and orange peelings and cabbage does not sink, it floats.

Q. Where did you tie up at Pier 8?

A. I tied up at the end of the pier, by the stern of the 'Coolidge'; I fastened my line to her stern line.

Q. And where was this garbage you claim came from the 'Coolidge' at that time?

A. There was some on my sampan and some in the harbor there.

Q. I mean with reference to the 'Coolidge', where was the stuff in the harbor?

A. It was drifting away from the 'Coolidge'.

Q. Drifting Ewa, or Waikiki?

A. Towards Sand Island.

Q. Straight astern, is that correct?

A. Yes sir.

Q. How far away?

A. Oh, I imagine it was about 15 or 20 feet away from the stern then.

Q. Just what did it consist of?

A. Orange peelings, celery——

Q. Not what was on your sampan; what was in the harbor?

A. In the harbor, practically the same thing; you can't change vegetables from a sampan to the harbor.

Q. Will you enumerate the different vegetables you saw?

A. Yes, sir.

Q. Do so, then.

A. There was celery, orange peelings, and cabbage peelings, and tea leaves.

Q. You don't know whether they came from the 'Coolidge' or not, do you?

A. I do.

Q. How; you couldn't see at the time you were hit?

A. There wasn't an airplane flying over my head to dump it?

Q. Isn't it possible that could have come from another ship?

A. It could not have.

The Court. Was there any other ship lying in that proximity?

A. No sir.

Mr. Russell. There was no ship at Pier 9?

A. There was the Coast Guard ship, yes sir.

Q. How about Pier 10 and Pier 11?

A. I don't remember that now."

(R. 92, 93, 94.)

Appellants offered absolutely no evidence disputing Mr. Arthur's testimony that some of the refuse thrown from the Steamship "President Coolidge" landed upon the waters of Honolulu Harbor.

A complete reading of the appellee's evidence is recommended. However, the extracts therefrom above referred to definitely show the unsoundness of appellants' contention that there was no evidence before the court below that any of the refuse landed upon the waters of Honolulu Harbor.

(b)

The refuse at the ship stern came therefrom.

Appellants further argue that the evidence shows that the first time Mr. Arthur saw any refuse upon the water was when, after being hit, he was boarding the Steamship "President Coolidge" to investigate the matter, and that there is no proof of that refuse being part of the refuse previously thrown from that vessel.

It is difficult to take this contention of appellants seriously when one consults the record. The record shows that Mr. Arthur testified that upon being hit with this refuse his sight was impaired for less than

a minute (R. 77); that the refuse which hit him consisted in part of cabbage, orange peelings, celery, tea leaves and water (R. 76); that practically all of this refuse landed in the water except the dry rubbish which stayed upon the stern of his sampan (R. 76, 91); that within four or five minutes he proceeded to go aboard the Steamship "President Coolidge" (R. 80), first tying up his sampan at the stern of the "Coolidge" (R. 93); that at that time he saw orange peelings, celery and cabbage floating in the water about 15 or 20 feet from the stern of the "Coolidge" (R. 92, 93) which were of the same type of refuse which decorated his sampan (R. 93); that he knew that the floating refuse at the stern of the "Coolidge" came from the "Coolidge" (R. 94) and that no other ship was lying in that proximity (R. 94).

To the logical mind, and in the absence of evidence to the contrary, this evidence leads to but one conclusion—namely, that the refuse, like in kind to that which hit Mr. Arthur, which four or five minutes after he was hit he found floating 15 or 20 feet from the stern of the Steamship "President Coolidge", was part of the refuse which those few minutes before had been thrown from that vessel. It certainly cannot be said that the lower court's finding from the evidence that refuse matter was thrown from the Steamship "President Coolidge" into the navigable water of Honolulu Harbor was clearly wrong. Indeed, it can only be correctly said that its finding was clearly right and that it is supported by substantial evidence.

(c)

Liability of vessel is not dependent upon proof of who did the throwing of the refuse.

Going beyond the scope of the reasons assigned at the trial in support of their Motion to Dismiss the Libel, appellants here contend at length that appellee failed to show that the person who threw the refuse from the deck of the Steamship "President Coolidge" was an employe thereof.

There is no merit to this contention. The Libel is against the vessel. It charges that she is liable to a statutory penalty because she was "used and employed in violating" Section 407 of Title 33. Upon these allegations in conformity with long established principles of maritime law, the vessel herself—not the person who did the throwing of the refuse from her decks—is the responsible entity and she is charged as the offending thing. The person who threw the refuse from her decks very probably committed a criminal act. But neither the criminal nature of that person's act, nor his connection or lack of connection with the vessel, is an element in the proof of the allegation that the ship herself was "used and employed in violating" 33 *United States Code,* Section 407. *The Scow "6-S",* 250 U. S. 269, 272, 63 L. Ed. 977, 39 S. Ct. 452. *The Colombo,* 42 F. (2) 211.

Upon proof—of which in this case there is ample—that refuse matter was thrown into the navigable waters from this vessel, we pass to the legal question of whether the vessel was then "used and employed in violating" 33 *U. S. C.,* Section 407, as a matter of

law. This question of law is hereinafter discussed in II of this brief.

(d)

Credibility of Mr. Arthur's testimony.

We have seen (I (a) (b)) by reference to the record that there was ample uncontradicted evidence presented to the court below to the effect not only that refuse matter was thrown from the vessel into the navigable waters of Honolulu Harbor, but also that a substantial part of the refuse so thrown landed upon those waters.

But appellants say that the evidence is not entitled to the weight which the lower court gave it because Mr. Arthur had a financial interest in the result of this case, and because appellants disbelieve parts of his testimony.

Let it be pointed out to appellants that their unbecoming insinuation that Mr. Arthur was not testifying truthfully to the best of his knowledge and recollection because he had a financial interest in the success of this case is wholly unsound even in point of law. In the first place, the detection of violations of 33 *U. S. C.,* Section 407, is Mr. Arthur's job for which he gets paid as an employe of the United States Engineers, who are charged by statute with the enforcement of this law. 33 *U. S. C.,* Section 413. A federal employe gets no bonus for discharging his duty. Secondly, 33 *U. S. C.,* Section 411, grants one half of the fine imposed to the person or persons who gave information leading to a *conviction.* By no distortion

of legal reasoning can it be said that a penalty imposed upon a vessel pursuant to Section 412 of Title 33 *U. S. C.* is conditioned upon a "conviction" of the vessel.

Appellants further endeavor to discredit Mr. Arthur's testimony by showing mathematically that his nautical calculations made on the witness stand were inaccurate (R. 86); and by indicating that they disbelieve that he could recognize a person as a Chinese person at the distance mentioned by him (R. 87).

The court below saw and heard Mr. Arthur testify. It must have observed, as will this court from reading his testimony, that Mr. Arthur has not had the advantage of advanced education. It is apparent from the record that in making his nautical calculations on the stand that he was giving what in his opinion were the approximate distances and rates of speed called for by the questions. It cannot be said that because his mathematics as to distance or his judgment as to speed may have been inaccurate that his testimony as a whole was unworthy of belief.

Mr. Arthur may also have been mistaken as to how far away he was from the person on board the Steamship "President Coolidge" whom he identified from his color and attire as a Chinese person, but the fact is that whatever the distance was, he did see this individual. That the reasons why Mr. Arthur judged the individual to be a Chinese are sound is attested to by cases under the Chinese Exclusion Law. See 3 *C. J. S.*, Sec. 56 (b).

(e)

Appellee met burden of proof of essential facts.

The appellants contend that the statutes involved in this case are of a penal nature. Therefore they argue that the appellee failed to establish by the requisite degree of proof (1) that any of the refuse thrown from the Steamship "President Coolidge" landed upon the navigable waters of Honolulu Harbor and utterly failed to prove (2) that the person who did the throwing of the refuse was connected with the ship.

That a substantial portion of the refuse thrown from this ship into the navigable waters of the harbor actually landed therein is proven by the evidence indeed beyond a reasonable doubt (see I (a) and (b); and R. 71-104).

That it was no part of appellee's case to prove that the person who threw the refuse from the ship was in any way connected therewith has already been pointed out (see I (c)) and will be further elaborated upon in the balance of this brief.

II.

THE LOWER COURT DID NOT ERR IN HOLDING AS A MATTER OF LAW THAT THE APPELLANT, THE STEAMSHIP "PRESIDENT COOLIDGE", AT THE TIME THE REFUSE MATTER WAS THROWN FROM HER, WAS A VESSEL "USED OR EMPLOYED" IN A VIOLATION OF 33 UNITED STATES CODE, SECTION 407, WITHIN THE MEANING OF 33 UNITED STATES CODE, SECTIONS 411 AND 412.

Again adverting to the asserted penal nature of 33 *U. S. C.,* Sections 407, 411 and 412, appellants make the argument that the vessel was not "used or employed in violating" Section 407 because the element of intent to do, or knowledge of, the prohibited act is lacking.

In elaboration of the argument it is said that "used or employed" means "put to the purpose of" and it is said that in the instant case the Steamship "President Coolidge" was not only not put to the purpose of casting refuse into Honolulu Harbor, but that the refuse so thrown was done without the knowledge of her licensed personnel or owner.

Appellee concedes the latter but submits that the former begs the question of law.

As both authoritative and persuasive on this point, appellants cite *United States v. The Anjer Head,* 46 Fed. 664; *United States v. Carrol Oil Terminals, Inc.,* 18 Fed. Supp. 1008, and *The Colombo,* 28 Fed. (2) 1004.

The appellee's position upon this point of law is that the statutes involved are remedial rather than strictly penal in nature; that they pertain to offenses or acts which are not *malum in se* but to acts which

are *mala prohibita.* That is, Congress enacted these statutes under its police powers and declared the act of throwing refuse into the navigable waters of the United States punishable not because in and of itself such an act was inherently evil, but because Congress had so legislated to better safeguard the nation's harbors in the interest of commerce and the public good. *"Scow 36",* 144 Fed. 932. Of similar character are laws relating to the public health and safety which make the doing of a prohibited act an offense without regard to intent or knowledge.

That the statutes here involved have long been regarded as defining a misdemeanor (in the case of individuals) which is *malum prohibitum* is attested to by the case of *Scow No. 36, New England Dredging Co. v. United States,* CCA-1, 144 Fed. 932.

The case of the *"Scow 36"* presented upon appeal the very question which the appellants raise here. It was held in that case that 33 *U. S. C.,* Sections 407, 411 and 412, defined an offense which was *malum prohibitum* and that therefore the *Scow 36* was liable to the statutory penalty although the refuse was dumped into navigable waters without the knowledge, intent or order of the owner, person in charge of the dredge or captain of the tugboat, and contrary to general instructions.

Appellants may be heard to say at this point—perhaps—but even so, the case of the *Scow 36* also holds that the scow was "used" in violating Section 407 because there was a scowman on board the scow for the purpose of dumping the refuse and that

though he disobeyed general instructions in dumping the refuse, his relation to the vessel was such that it could be said that the scow was "used" for that purpose, while in the instant case no connection is shown between the person who threw the refuse and the ship.

A perusal of the few cases which deal with, rather than solve, the meaning of the phrase "used or employed" which appears in 33 *U. S. C.,* Section 412, and similar statutes, indicates that there is but little rhyme or reason as to why in a particular case the court held the vessel was "used" or "not used" in violating Section 407. Most of the conclusions upon the point represent the court's rationalization because of practical considerations. See *The Pile Driver No. 2,* 239 Fed. 489 at 490, CCA-2.

Of such character are the three principal cases cited by appellants, *The Anjer Head; United States v. Carrol Oil Terminals, Inc.,* and the district court's decision in *The Colombo*—all supra. Particularly are the opinions in these cases off color when it is realized that the act of dumping rubbish is an act which is *malum prohibitum* and that in admiralty the vessel is treated as the offending thing.

The Anjer Head was thereafter explained in *The Bombay,* 46 Fed. 665, where, in a proceeding in rem to charge the offending vessel with a fine for being "used or employed" in unlawfully dumping ashes as prohibited by Section 4 of the New York Harbor Act of June 29, 1888, the District Court of New York held that where such ashes had been observed to have been dumped from the vessel, the vessel was used and em-

ployed in violating the law within the meaning of the statute. The Court went on to say at page 668:

> "It was contended in argument that in the case of The Anjer Head the decision was that under this statute it must appear that the ship was devoted by her owners to the business of dumping ashes before the ship could be held liable; in other words, that the act applied to dumping scows only, and not to steamers engaged in transporting freight and passengers through the harbor of New York. But I do not understand the decision in that case to go to that length. Such a decision would render the statute inoperative to remedy one of the serious evils intended to be reached,—namely, the dumping of ashes from steamers in the lower bay."

It is of considerable significance that appellants cite *The Colombo* only as 28 F. (2) 1004, because it is the opinion of the Circuit Court for the Second Circuit, 42 F. (2) 211, rendered in connection with the reversal of 28 F. (2) 1004, which does give rhyme and reason to some of the prior cases and to the phrase "used or employed" itself which appears in 33 *U. S. C.,* Section 412, and similar statutes.

The case against *The Colombo* was brought originally under 33 *U. S. C.,* Sections 407, 411, 412. By an amendment 33 *U. S. C.,* Sections 441 and 450, were invoked. It alleged that the vessel was liable for a statutory penalty because oil was discharged from her into the navigable waters.

The District Court dismissed the Libel upon the authority of *The Anjer Head,* 46 Fed. 664. The dis-

trict court held that since the discharge of the oil was unintentional and there was no intent that the vessel should be used to dump oil into the harbor, that as a matter of law the vessel was not "used or employed in violating" the law.

The government appealed the case of *"The Colombo"* to the circuit court. Upon the same facts the circuit court reversed the district court, and imposed a penalty upon the vessel. See 42 F. (2) 211 (CCA-2) (1930). In holding that the vessel was "used or employed" in violating the law, the circuit court laid down the law upon this point as follows:

> "At one time it was thought that section 450, which makes any vessel liable when 'used or employed' in such work, was limited to those whose owners or masters had authorized the wrongful act (The Anjer Head (D. C.), 46 F. 664), but this was soon overruled (The Bombay (D. C.), 46 F. 665), and we have already once approved the later construction (The J. Rich Steers (C. C. A.), 228 F. 319, 322). *The statute speaks with the maritime law in mind, under which the ship is so often regarded as an offender. This is indeed a fiction, but its roots go back far into the law, and the resulting liability is like many others imposed upon an individual, regardless of his personal fault. Having committed his ship to the seas, an owner takes the risk of much which he cannot easily control. As between him and the injured party, it is thought desirable to throw the loss where prevention would have been at least possible.*"
>
> 42 F. (2) 211 at 212.

There is the key to correct construction of 33 *U. S. C.,* Sections 412 and 450. The Second Circuit Court cognizant of the objective of Congress in enacting the law, the principles of maritime law, and the remedial nature of the statute, establishes the intelligent rule of law that in cases of this kind regardless of who aboard the vessel did the act, regardless of intent, knowledge, or orders to the contrary, the vessel is held responsible and treated in law as the offending thing because she has the best means of preventing the occurrence and recurrence of the prohibited acts.

That the key provided by *The Colombo* to the proper construction of the statutes here involved is sound is evidenced by the recent decision of the Circuit Court for the Fifth Circuit in the case of *Hegglund v. United States* (June 1938), 97 F. (2) 543. In that case the appellant, the master of a ship, was found guilty by the lower court upon a charge of violation of the *Oil Pollution Act of 1924* (33 U. S. C., Section 431 et seq.). It appears that the oil was unintentionally "discharged" into the waters as a result of the ship's leaking rivets. In sustaining the appellant's conviction the circuit court took occasion to refer to the related statutes prohibiting the pollution of navigable water and to cite with approval *The Colombo* in the following manner:

> "(1) Short work may be made of the constitutional point. While it is true that the particular section under which the information was lodged against appellant has apparently not been considered by an appellate court, this section is in addition to and supplementary of anti-pollu-

tion laws long existing, the Pollution Act of June 29, 1888, Title 33, Sec. 444, U. S. C. A. and that of March 3, 1899, Title 33, Sec. 407, U. S. C. A., both held comprehensive enough in scope to include oil pollution. United States v. Alaska Southern Packing Co., 9 Cir., 84 F. 2d 444. The Albania, D. C., 30 F. 2d 727; The Colombo, 2 Cir., 42 F. 2d 211.

For many years these Acts have been uniformly enforced and sustained. No question has been, nor, we think, can, now be successfully raised as to their constitutionality. They neither purport to, nor do they, impose cruel and unusual punishments upon any one, least of all appellant, who has suffered only a small fine. Nor do they deprive any one of his liberty without due process; *they merely exert the power the United States has over navigable waters, to preserve and protect them from unnecessary pollution by the very activities, those of navigation, which the United States is authorized to supervise, foster and control. Many cases have been decided sustaining this legislation, and giving it positive and comprehensive meaning and effect to prevent the mischiefs it was aimed at.* Authorities supra, and The Scow No. 36, New England Dredging Co. v. United States, 1 Cir., 144 F. 932; The Scow No. 9, The Minot I. Wilcox, D. C., 152 F. 548.

(2) When it comes to the merits, we do not think appellant stands any better. It is undisputed that oil was discharged from the Bidwell while in the charge and under the control of defendant as its master, and that he knew, or was charged with knowledge, that such discharge would likely occur in connection with the load-

ing. *We think it will not do to say that because the discharge was not intentional, but the result of leaking rivets, it was not within both the letter and the spirit of the act. The Colombo, supra, so construed the earlier statute, and gave it application in a like situation.*

(5) * * * In our view, the statute, except under the conditions it sets out, absolutely forbids the prohibited discharge in coastal waters, and due care is not a defense. *It charges those who permit the discharge of oil in navigable channels, other than as permitted in the Act, with doing so at their peril, and with absolute accountability. Such a construction of the statute puts no undue burden on masters and shipowners. The view appellant contends for would change the statute from one of strict prohibition, as it was written, to one merely requiring the exercise of due care. The statute does not read that way. We do not think it was so designed. The statutes which it supplements do not read so; they have have not been so construed. They, as this statute is, are designed to put upon those using navigable waters the burden of using, without unnecessarily polluting, them. They proceed upon the recognition that pollution by the discharge of refuse is normally not necessary, and they rigidly prohibit that discharge. But for these statutes, navigable channels would no doubt be shamefully polluted, the stream life therein destroyed, by the deposit and discharge therein of oil and other refuse.*

We think the judgment was right. It is affirmed."

Hegglund v. United States, 97 F. (2d) 542, at 543, 544 and 545 (June 1938).

It is for the reasons expressed in *The Colombo,* 42 F. (2) 211, at 212, and further elaborated upon in *Hegglund v. United States,* 97 F. (2) 542, that appellee submits that appellants are in error in contending it to have been an essential part of appellee's case to establish that the person who threw the refuse in the instant case was affiliated with the ship.

That the statutory interpretation here contended for by appellee and supported by *The Colombo* and *Hegglund v. United States* is sensible and just is indeed well illustrated by the instant case. Neither appellants nor appellee knew or now know who aboard the Steamship "President Coolidge" did the prohibited act. But the vessel through her licensed personnel could have and should have made it her business to see to it that none of the acts prohibited by this statute occurred. For her failure in this regard, the vessel should be held responsible because she, not the appellee, had the best possible means of controlling the situation. Further the salutary lesson taught the vessel by this case will serve to prevent recurrences by her and other vessels and the objective of Congress to keep the navigable waters of the United States free from debris in the interests of commerce and the public good will be advanced.

This court has not as yet squarely passed upon the question of law raised by this appeal. It is, however, significant to note the similarity of the libel sustained by this court in *La Merced,* 84 F. (2) 444, to the libel in the instant case, and to observe that though the

appeal was in admiralty upon a dismissal of the libel by the lower court, neither the appellee nor the court itself raised this question of law.

It is submitted that the rule of law laid down by *The Colombo,* 42 F. (2) 211, strongly approved in *Hegglund v. United States,* supra, and contended for by appellee will appeal to this court as sound and as sustaining the court below in its conclusion of law that the Steamship "President Coolidge" was "used and employed in violating" Section 407 within the meaning of Section 412. As clearly pointed out in *Hegglund v. United States,* the view for which appellants contend "would change the statute from one of strict prohibition, as it is written, to one merely requiring the exercises of due care" and thus render ineffectual the intent of Congress to keep the nation's navigable waters free from pollution and debris.

CONCLUSION.

Appellee respectfully submits that there was substantial uncontradicted evidence before the trial court to sustain its finding that refuse was thrown out of the Steamship "President Coolidge" into the navigable waters of Honolulu Harbor and that in so finding the district court did not err.

It is further submitted that the district court did not commit an error of law in concluding that the Steamship "President Coolidge" was "used and em-

ployed in violating" the provisions of 33 *U. S. C.*, Section 407.

Respectfully submitted,

THE UNITED STATES OF AMERICA, Appellee,

By INGRAM M. STAINBACK,

United States Attorney, District of Hawaii,

By J. FRANK McLAUGHLIN,

Assistant United States Attorney, District of Hawaii,

FRANK J. HENNESSY,

United States Attorney for the Northern District of California,

Proctors for Appellee.

(Appendix Follows.)

Appendix.

Appendix

Title 33, United States Code, Section 407:

"§407. *Deposit of refuse in navigable waters generally.* It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided,* That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further,* That the Secretary of War, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be

injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful (Mar. 3, 1899, c. 425, §13, 30 Stat. 1152)."

Title 33, United States Code, Section 411:

"§411. *Penalty for wrongful deposit of refuse; use of or injury to harbor improvements, and obstruction of navigable waters generally.* Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions of sections 407, 408, and 409 of this chapter shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2500 nor less than $500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction (Mar. 3, 1899, c. 425, §16, 30 Stat. 1153)."

Title 33, United States Code, Section 412:

"§412. *Liability of masters, pilots, and so forth, and of vessels engaged in violations.* Any and every master, pilot, and engineer, or person or persons act-

ing in such capacity, respectively, on board of any boat or vessel who shall knowingly engage in towing any scow, boat, or vessel loaded with any material specified in section 407 of this chapter to any point or place of deposit or discharge in any harbor or navigable water, elsewhere than within the limits defined and permitted by the Secretary of War, or who shall willfully injure or destroy any work of the United States contemplated in section 408 of this chapter, or who shall willfully obstruct the channel of any waterway in the manner contemplated in section 409 of this chapter, shall be deemed guilty of a violation of this chapter, and shall upon conviction be punished as provided in the preceding section, and shall also have his license revoked or suspended for a term to be fixed by the judge before whom tried and convicted. And any boat, vessel, scow, raft, or other craft used or employed in violating any of the provisions of sections 407, 408 and 409, of this chapter shall be liable for the pecuniary penalties specified in the preceding section, and in addition thereto for the amount of the damages done by said boat, vessel, scow, raft, or other craft, which latter sum shall be placed to the credit of the appropriation for the improvement of the harbor or waterway in which the damage occurred, and said boat, vessel, scow, raft, or other craft may be proceeded against summarily by way of libel in any district court of the United States having jurisdiction thereof (Mar. 3, 1899, c. 425, §16, 30 Stat. 1153).

Title 33, United States Code, Section 413:

§413. *Duty of district attorneys and other Federal officers in enforcement of provisions; arrest of offenders.* The Department of Justice shall conduct the legal proceedings necessary to enforce the foregoing provisions of the foregoing sections of this chapter; and it shall be the duty of district attorneys of the United States to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of War or by any of the officials hereinafter designated, and it shall furthermore be the duty of said district attorneys to report to the Attorney General of the United States the action taken by him against offenders so reported, and a transcript of such reports shall be transmitted to the Secretary of War by the Attorney General; and for the better enforcement of the said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of War, and the United States collectors of customs and other revenue officers shall have power and authority to swear out process, and to arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by the aforesaid sections of this chapter, or who may violate any of the provisions of the same: *Provided,* That no person shall be arrested without process for any offense not committed in the presence of some one of the aforesaid officials: *And provided further,* That whenever

any arrest is made under the foregoing provisions of this chapter, the person so arrested shall be brought forthwith before a commissioner, judge, or court of the United States for examination of the offenses alleged against him; and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States (Mar. 3, 1899, c. 425, §17, 30 Stat. 1153)."

No. 8847

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

JOAN STORM DEZENDORF,

Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker & Baird Company, Law Printers, Los Angeles.

No.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Appellant:

CALVIN L. HELGOE, Esq.,

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Los Angeles, California.

For Appellee:

ALFRED WRIGHT, Esq.,

GORDON HALL, Esq.,

621 South Spring Street,

Los Angeles, California.

United States of America, ss.

To TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 2nd day of June, A. D. 1938, pursuant to an order allowing appeal filed on May 2nd, 1938, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause In Equity No. 1173-C, Central Division, wherein JOAN STORM DEZENDORF, an individual, sometimes known as Joan Storm is appellant and you are appellee to show cause, if any there be, why the decree, order or judgment in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable GEO. COSGRAVE United States District Judge for the Southern District of California, this 3rd day of May, A. D. 1938, and of the Independence of the United States, the one hundred and sixty-second.

Geo. Cosgrave

U. S. District Judge for the Southern District of California

Service of a copy of the foregoing Citation is acknowledged this 3rd day of May, 1938

Service of a copy of Assignment of Errors,

Service of a copy of Plaintiff's Petition for Appeal from Decree dismissing Bill of Complaint,

Service of a copy of Praecipe for Transcript of Record on appeal from Decree Granting Dismissal with prejudice.

Alfred Wright
Gordon Hall Jr.
Attorneys for Appellee

[Endorsed]: Filed May 3, 1938 R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION

———————

JOAN STORM DEZENDORF, an individual, sometimes known as Joan Storm,

Plaintiff,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,

Defendant.

In Equity No. 1173-C

BILL OF COMPLAINT IN EQUITY FOR INFRINGEMENT OF COMMON LAW COPYRIGHT.

Complaining of the above-named defendant, the plaintiff respectfully shows the court as follows:

I.

That plaintiff, Joan Storm Dezendorf, sometimes known as Joan Storm, is a citizen of the United States and a resident of the City of Los Angeles, County of Los Angeles, and State of California.

II.

That, upon information and belief, the defendant, Twentieth Century-Fox Film Corporation, at all times

hereinafter mentioned was, and still is, a corporation organized and existing under and by virtue of the laws of the State of New York, having a regularly established place of business in the City of Los Angeles, County of Los Angeles, State of California, and in the Central Division of the United States District Court for the Southern District of California, and was, and still is, engaged in the business of manufacturing and distributing what is commonly characterized and known as motion pictures and motion picture photoplays.

III.

That the grounds on which the jurisdiction of this court depends are that this is a suit of a civil nature in equity for infringement of common law copyright, between citizens of different states, wherein the matter in controversy exceeds, exclusive of interest and costs the sum or value of Three Thousand Dollars ($3,000.00).

IV.

That prior to January 1, 1934, plaintiff created, originated, invented and wrote a new and novel play entitled "DANCING DESTINY".

V.

That the said play was written as an original and independent undertaking by said plaintiff, the author thereof, as aforesaid, and contains a large amount of matter wholly original with the said author thereof, and constitutes copyrightable subject matter, according to the common law of copyright.

VI.

That since writing said play entitled "DANCING DESTINY", as aforesaid, said plaintiff has maintained the same in unpublished form and as a result thereof

there was secured to her under the common law of copyright, the right as author and proprietor of an unpublished work to prevent the copying, publishing or use of such unpublished work without her consent.

VII.

That in or about the month of June, 1934, and pursuant to negotiations that had theretofore taken place, plaintiff had caused the manuscript of the play "DANCING DESTINY" to be delivered to defendant; that sometime subsequent to the month of June, 1934 and prior to the month of December 1935, said defendant rejected said manuscript of the play "DANCING DESTINY" and the same was returned to plaintiff. That on or about December 1, 1935, and at the request of the defendant, Twentieth Century-Fox Film Corporation the manuscript of said play was again submitted to the said defendant, and thereafter, and more particularly on or about January 31, 1936, said defendant informed the plaintiff that the said manuscript had been considered and found not to be the type of story it desired for two of its child stars, familiarly known as "Shirley Temple" and "Jane Withers".

VIII.

That the defendant then and there knew and was fully cognizant of the fact that plaintiff was the author and proprietor of said play "DANCING DESTINY" and the copyright title thereto, and that for motion picture purposes said literary property and dramatic play under the common law of copyright belonged to and was possessed by the plaintiff.

IX.

That notwithstanding the foregoing, the plaintiff shortly thereafter illegally and unlawfully manufactured

a picture entitled "STOWAWAY", which it then and there undertook to distribute and sell for profit in the various motion picture houses exhibiting pictures throughout the world.

X.

That the picture manufactured by the defendant entitled "STOWAWAY" is a talking motion picture photoplay.

(a) That said photoplay "STOWAWAY" is a deliberate piracy and infringement of plaintiff's play "DANCING DESTINY";

(b) The defendant illegally, unlawfully, wilfully and deliberately copied plaintiff's play "DANCING DESTINY";

(c) The defendant copied and made use of the same technique, dramatic situations and/or episodes, dramatic plot and its treatment, embellishment and detail;

(d) The defendant copied and made use of the same series of events and episodes with the conscious intention and purpose to excite by presentation and representation in "STOWAWAY" the same emotions in the same sequence with the same casual relation as plaintiff had invented and created in her play "DANCING DESTINY".

XI.

Plaintiff has not at any time granted to the defendant, any right, license or privilege to produce, present or represent in a talking motion picture, or otherwise, her play "DANCING DESTINY", or to make any dramatization of any character whatsoever in picture form of said play.

XII.

Upon information and belief the defendant has undertaken and is continuing to undertake to its profit and pecuniary advantage to distribute, license, lease, sell and use said talking motion picture "STOWAWAY" infringing and pirating plaintiff's play "DANCING DESTINY" throughout the United States of America and each and every state and dependency thereof, and in all foreign countries of the world and has caused said talking motion picture entitled "STOWAWAY", infringing and pirating plaintiff's play "DANCING DESTINY", to be exhibited in motion picture theaters in the State of California, including the Southern District thereof, and in divers and sundry other states of the United States of America, and is collecting large sums of money and securing large profits from the exhibitions of said infringed and pirated play.

XIII.

That by virtue of the defendant's illegal and unlawful acts, as aforesaid, the value of plaintiff's property is being rapidly destroyed.

XIV.

That the acts of the defendant are wrongful and continuing, consecutive and destructive. Plaintiff has no adequate remedy at law. The damage to the plaintiff is immediate; unless the defendant is enjoined and restrained by an injunctive pendente lite and permanently the value of plaintiff's property will be dissipated and destroyed and plaintiff irreparably and irretrievably injured.

XV.

Plaintiff files together with this, her bill of complaint, the manuscript copy of her play entitled "DANCING

DESTINY", marked "Plaintiff's Exhibit A". Plaintiff also files herewith a transcript of the dialog in action taken by plaintiff from said defendant's talking motion photoplay entitled "STOWAWAY", marked "Plaintiff's Exhibit B", and a copy of the dialog taken from defendant's talking motion picture entitled "STOWAWAY" marked "Plaintiff's Exhibit C", and demands, pursuant to the copyright laws, the rules of the Supreme Court of the United States, and of this court in such cases made and provided, that the defendant file forthwith with the Clerk of this Court a positive copy of said talking motion picture entitled "STOWAWAY" as the same is now being exhibited as aforesaid in order that this Honorable court may take cognizance thereof and from an examination and showing of said manuscript, scenario, continuity, and positive copy of the said talking motion picture be fully advised in the premises to the end that the plaintiff's rights in the premises may be fully protected.

WHEREFORE, the Plaintiff prays:

1. That a writ of subpoena issue out of this court directed to the defendant, commanding it to appear and answer this bill of complaint within twenty (20) days after the service of said writ.

2. That the defendant, and all persons, firms, or corporations acting under the defendant's direction, control, permission, and license, be enjoined and restrained pendente lite and permanently and perpetually thereafter from publicly or privately producing, presenting, performing or representing, publishing or advertising, distributing, showing or exhibiting in any manner or form whatsoever at any time or place in the United States of America, or in any other country of the world, its said pirating

and infringing talking motion picture at present entitled "STOWAWAY", or permitting said talking motion picture entitled "STOWAWAY" to be publicly or privately produced, presented, performed or represented, published or advertised, distributed, shown or exhibited or otherwise used in any manner or form whatsoever at any time or place in the United States of America, or in any other country of the world.

3. That the negative and positive prints of the said talking motion picture entitled "STOWAWAY" be impounded under the orders and directions of this Honorable court to the end that plaintiff's rights may not be further infringed by the defendant.

4. That the defendant be required to account for and pay over to the plaintiff any and all profits derived from any and all productions and presentations, showings or exhibitions of said talking motion picture entitled "STOWAWAY" at any and all places in the United States of America, or other countries of the world, whether such showings or exhibitions, presentations or representations have been public or private, and that to that end and for that purpose the defendant be required to exhibit its books, documents, papers and accounts in its possession with relation to all funds, moneys and receipts derived from the presentation, exhibition or showing of said talking motion picture entitled "STOWAWAY" and the method of their application.

5. That the defendant be required to pay to the plaintiff any and all damages sustained by the plaintiff in the premises.

6. That the defendant pay the costs of this action to plaintiff.

7. That the plaintiff have such other and further relief as the equity of the case may require and as to the court may seem meet and just.

Joan Storm Dezendorf

I. Henry Harris, Jr.
Calvin L. Helgoe
Jas. M. Naylor
Solicitors and Attorneys for Plaintiff.

STATE OF CALIFORNIA,)
) ss.
COUNTY OF LOS ANGELES.)

JOAN STORM DEZENDORF, being duly sworn, deposes and says that:

She is the plaintiff named in the foregoing bill of complaint; that she has read the foregoing complaint and knows the contents thereof; that the same is true of her own knowledge, except as to the matters therein stated to be alleged on information and belief and as to those matters she believes it to be true.

Joan Storm Dezendorf

Subscribed and sworn to before me this 26th day of May, 1937.

[Seal] E. T. Harley
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Jun, 2, 1937 R. S. Zimmerman, Clerk By L. B. Figg, Deputy Clerk.

[Title of District Court and Cause.]

ANSWER.

Comes now the defendant, Twentieth Century-Fox Film Corporation, a corporation, and, answering plaintiff's bill of complaint on file herein, admits, denies and alleges as follows:

I.

Admits the allegations of paragraphs I, II and III of said bill of complaint.

II.

Answering the allegations of paragraphs IV, V and VI, defendant is without knowledge respecting the allegations therein contained to the effect that plaintiff created, originated, invented and wrote, or created, originated, invented or wrote, a play entitled "Dancing Destiny" as an original and independent, or as an original or independent, undertaking or otherwise; and that plaintiff was or is the author thereof; and that said play contains matter original with plaintiff; and that plaintiff has maintained said play in unpublished form, and prays that a strict proof said allegations be required.

Further answering the allegations of said paragraphs, defendant denies that the play therein alleged to have been composed by plaintiff was or is a new and novel or new or novel play; denies that it constitutes an original and independent or original or independent undertaking by its author, and denies that it contains a large or any amount of matter original with its author; denies that it constitutes copyrightable subject-matter according to the common law of copyright or according to the Constitution or laws of the United States or otherwise.

Further answering the allegations of said paragraphs, defendant denies that the contents of the play entitled "Dancing Destiny" are in any respect novel or original with plaintiff but that the same are to be found in the works of other authors and in the public domain, and denies that plaintiff has had or has any right to prevent the use of the same by other persons or any right of property whatsoever therein.

III.

Answering the allegations in paragraph VII, defendant denies that plaintiff delivered or caused to be delivered the manuscript of the play entitled "Dancing Destiny" to defendant in or about the month of June, 1934, and alleges, on the contrary, that a story outline purporting to have been written by one Joan Storm was submitted to defendant by a literary agent purporting to represent the author thereof on or about the 15th day of November, 1934; denies that said submission was made pursuant to negotiations that had theretofore taken place between defendant and plaintiff, or between defendant and any other person; denies that the said story outline was kept or retained by defendant for the length of time indicated in line 31 on page two to line two of page three of said complaint, and denies that it returned the same to plaintiff. On the contrary, defendant alleges that it rejected said story outline on or about the 18th day of December, 1934 and returned the same to the person who had theretofore submitted it to defendant, as hereinabove alleged.

Further answering the allegations of said paragraph VII, defendant admits that the said story outline was resubmitted to it, but denies that the said re-submission was made at its request; denies that said re-submission took

place on or about December 1, 1935, alleging in this connection the said story outline was re-submitted to it by the same literary agent who had theretofore submitted the same to defendant on or about the 28th day of January, 1936, and that on or about the 31st day of January, 1936, defendant again rejected the said story outline and returned the same to the agent who had resubmitted it as hereinabove alleged.

Further answering the allegations of said paragraph VII, defendant denies that it informed plaintiff that the said story outline had been considered and found to be unsuitable for motion picture purposes, but admits that the said story outline or play entitled "Dancing Destiny" was and is unsuitable for motion picture purposes.

IV.

Answering the allegations of paragraph VIII, defendant denies that it at any time knew that plaintiff was or is the author and proprietor, or the author or proprietor, of said play entitled "Dancing Destiny", or that she was the owner or proprietor of any copyright or other title thereto, or that for motion picture or any other purposes said property or play belonged to and was possessed by, or belonged to or was possessed by, plaintiff, and further denies that it was at any time cognizant of any fact, matter or thing alleged by plaintiff in paragraph VIII.

Further answering the allegations of said paragraph VIII, defendant is without knowledge respecting the authorship of the play entitled "Dancing Destiny", the

ownership or proprietorship of the copyright or other title thereto, and the ownership or proprietorship of said play or any rights therein or thereto, and prays that strict proof of the allegations respecting the ownership and proprietorship, or ownership or proprietorship, of said play, its contents, the copyright, or any other title thereto be required.

V.

Answering the allegations of paragraph IX, defendant admits that it manufactured, distributed and exhibited a motion picture entitled "Stowaway", but denies that said manufacture, distribution or exhibition of the motion picture entitled "Stowaway" was or is in anywise illegal and unlawful, or illegal or unlawful, and denies that any act, matter or thing alleged, contained or set forth in said paragraph IX was or is illegal and unlawful, or illegal or unlawful.

VI.

Answering the allegations of paragraph X, defendant admits that its motion picture entitled "Stowaway" is a talking motion picture play, but, in connection therewith:

(a) Denies that the motion picture entitled "Stowaway" was or is a deliberate or other or any piracy and infringement, or piracy or infringement, of the play entitled "Dancing Destiny" or the story outline hereinbefore mentioned.

(b) Denies that defendant illegally, unlawfully, wilfully and deliberately, or illegally, unlawfully, wilfully

or deliberately copied or reproduced the play entitled "Dancing Destiny" or the story outline hereinbefore mentioned.

(c) Denies that defendant copied and made use of, or copied or made use of, any of the technique, dramatic situations and episodes, or technique, dramatic situations or episodes, contained or to be found in the play entitled "Dancing Destiny" or the story outline hereinbefore mentioned; denies that it copied and made use of, or copied or made use of, the dramatic plot, treatment, embellishment and detail, or the dramatic plot, treatment, embellishment or detail thereof.

(d) Denies that it copied and made use of, or copied or made use of, the same series of events and episodes or events or episodes, or of any of the events or episodes contained or to be found in the play entitled "Dancing Destiny" or the said story outline; denies that at any time it had any intention or purpose to excite, by the presentation or representation of the events and episodes contained in its motion picture entitled "Stowaway", or otherwise, the same or any of the emotions in the same or similar sequences, or with the same or similar relation, as might be excited or evoked in the mind of a reader of the said play or the said story outline; denies that the events and episodes of its motion picture entitled "Stowaway" excite or evoke the same or similar emotions as the events and episodes to be found in said play or story outline, or emotions in anywise similar to those

that may be excited or evoked by any events or episodes invented or created by plaintiff.

Except as to the allegation of paragraph X which is hereinabove specifically admitted, it is the intention of defendant to place at issue each, every and all of the allegations of said paragraph X, and accordingly defendant specifically denies each and every allegation, matter and thing therein set forth and alleged.

Further answering the allegations of paragraph X, defendant denies that it infringed upon either the theme, plot, characters, incidents or situations of the play entitled "Dancing Destiny" or the story outline hereinbefore mentioned, or the treatment thereof, and alleges that the motion picture entitled "Stowaway" produced by it is not an infringement of the said play or the story outline thereof, or of any right of plaintiff or any other person therein or thereto, alleges that the said play and the said motion picture are entirely different and have no points of resemblance save and except such general points of resemblance as exist in any other dramatic composition written upon any kindred subject, and that insofar as any material in the said motion picture has any point of resemblance to said play or the said story outline, such points are common incidents found in the works of many authors and in the public domain.

Further answering the allegations of said paragraph X, defendant alleges that its motion picture entitled "Stowaway" is entirely independent and original dramatic com-

position, created by authors in the employ of defendant, working without knowledge of the existence of the play entitled "Dancing Destiny" or the story outline hereinbefore mentioned, or the contents thereof, and that no use whatsoever of said play or story outline was made in the creation or production of the said motion picture.

VII.

Admits the allegations of paragraph XI.

VIII.

Answering the allegations of paragraph XII, defendant admits that it has distributed, licensed and leased, for exhibition purposes, its motion picture "Stowaway" and has collected revenue therefrom, and will continue so to do; but denies that its said actions infringe or pirate, or constitute an infringement or pirating of the play entitled "Dancing Destiny" or the said story outline, and denies that any matter or thing alleged or set forth in said paragraph XII constitutes any infringement of the said play or story outline or of any right of plaintiff therein or thereto.

IX.

Answering the allegations of paragraph XIII, defendant denies that by virtue of any illegal and unlawful, or illegal or unlawful, acts, and that by virtue of any acts whatsoever on its part, the value of plaintiff's alleged property is being destroyed, and further denies that plaintiff's alleged property or rights are in anywise being destroyed or impaired.

X.

Answering the allegations of paragraph XIV, defendant denies that the acts therein referred to are wrongful and destructive, or wrongful or destructive, of any right or property, or injurious to any right or property, of plaintiff; denies that plaintiff has no adequate remedy at law; denies that plaintiff has suffered or will suffer any immediate or other damage; denies that unless defendant is enjoined or restrained, the value of plaintiff's alleged property will in anywise be dissipated and destroyed, or dissipated or destroyed, or that any right of plaintiff will be in anywise impaired, and denies that unless defendant is enjoined or restrained, plaintiff will be injured irreparably and irretrievably, or irreparably or irretrievably, or otherwise or at all.

XI.

Answering the allegations of paragraph XV, defendant denies that any law, statute, or rule of court requires it to file with the clerk of this court a copy of an allegedly infringing work in an action or suit brought for the alleged infringement of a work not copyrighted under the laws of the United States.

WHEREFORE, defendant prays that plaintiff take nothing by her bill of complaint and that this suit be dismissed; that defendant have and recover of and from plaintiff its costs of suit incurred, and for such other and further relief as the Court may deem just and equitable.

Alfred Wright

Gordon Hall Jr.

Solicitors for Defendant, Twentieth Century-Fox Film Corporation.

UNITED STATES OF AMERICA,)
)
SOUTHERN DISTRICT OF CALIFORNIA,) ss.
)
COUNTY OF LOS ANGELES,)

GEORGE F. WASSON, JR., being first duly sworn, deposes and says that he is an Assistant Secretary of TWENTIETH CENTURY-FOX FILM CORPORATION, the defendant in the above entitled action, and that as such he is duly authorized to, and does, make this verification on behalf of said corporation; that he has read the foregoing Answer and knows the contents thereof, and that the same are true of his own knowledge except as to those matters therein stated on information or belief, and as to those matters he believes them to be true.

George F. Wasson, Jr.

Subscribed and sworn to before me this 26th day of June, 1937.

[Seal] Emilio C. de Lavigne
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires, November 27, 1940.

[Endorsed]: Received copy of the within this 28 day of June, 1937 C. L. Helgoe, By J. Clark, attorney for plaintiff. Filed Jun. 29, 1937. R. S. Zimmerman, Clerk By L. B. Figg, Deputy Clerk.

[Title of District Court and Cause.]

STIPULATION AMENDING BILL OF COMPLAINT

IT IS HEREBY STIPULATED AND AGREED by and between the plaintiff and the defendant, through their respective solicitors, that the bill of complaint on file herein may be amended by the filing with the Clerk of the above entitled court of a copy of plaintiff's play entitled "DANCING DESTINY" and a release print of defendant's motion picture entitled "STOWAWAY", which shall both be deemed to be annexed to said bill of complaint as schedules thereto and incorporated therein with the same force and effect as though originally included therein as integral parts thereof.

Dated: September 10, 1937.

I. HENRY HARRIS, JR.,
CALVIN L. HELGOE
JAS. M. NAYLOR
By Calvin L. Helgoe
Solicitors and Attorneys for Plaintiff.
ALFRED WRIGHT
GORDON HALL, JR.
By Alfred Wright
Solicitors for Defendant.

IT IS SO ORDERED:
Geo. Cosgrave
District Judge.

[Endorsed]: Filed Sep. 15, 1937. R. S. Zimmerman, Clerk By L. B. Figg, Deputy Clerk.

[Title of District Court and Cause.]

STIPULATION FOR FILING OF MOTION TO DISMISS.

IT IS HEREBY STIPULATED AND AGREED by and between the plaintiff and the defendant, through their respective solicitors, as follows:

1. That defendant may file herein the accompanying motion to dismiss plaintiff's bill of complaint, as said bill of complaint is amended pursuant to stipulation and order dated September 10, 1937;

2. That the motion may be brought on for hearing before the above entitled court by either party upon ten days' notice to the other; and

3. That said motion is based and shall be considered upon said bill of complaint, amended as aforesaid, unaffected by any admission, denial or allegation contained in the answer heretofore filed by defendant.

Dated: September 11, 1937.

I. HENRY HARRIS, JR.,
CALVIN L. HELGOE
JAS. M. NAYLOR
By Calvin L. Helgoe
Solicitors for Plaintiff.
ALFRED WRIGHT and
GORDON HALL, JR.
By Alfred Wright
Solicitors for Defendant.

IT IS SO ORDERED:
Geo. Cosgrave
District Judge.

[Endorsed]: Filed Sep. 15, 1937. R. S. Zimmerman, Clerk By L. B. Figg, Deputy Clerk.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant, TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation, and by its solicitors, Alfred Wright and Gordon Hall, Jr., moves the Court to dismiss plaintiff's bill of complaint, as amended pursuant to stipulation and order dated September 10, 1937, annexing thereto and incorporating therein a copy of plaintiff's play entitled "DANCING DESTINY" and a release print of defendant's motion picture entitled "STOWAWAY", upon each of the following grounds and for the following reasons:

1. That said bill of complaint, amended as aforesaid, fails to state facts sufficient to constitute a cause of action.

2. That it affirmatively appears from the said bill of complaint, amended as aforesaid, that no cause of action exists in favor of plaintiff against defendant.

3. That it affirmatively appears from the said bill of complaint, amended as aforesaid, that defendant has neither done nor suffered to be done any act constituting an infringement of any right of plaintiff's in or to the play entitled "DANCING DESTINY".

4. That it affirmatively appears from the said bill of complaint, amended as aforesaid, that no matter of equity exists entitling plaintiff to the relief prayed for, or to any relief, against the defendant.

Said motion will be based upon the said bill of complaint, amended as aforesaid, upon the stipulation and

order dated September 10, 1937, amending said bill of complaint as aforesaid, upon the stipulation and order dated September 11, 1937, permitting this motion to be filed, and upon this motion and the memorandum of points and authorities served and filed herewith.

Dated: September 11, 1937.

ALFRED WRIGHT
GORDON HALL, JR.
By Alfred Wright
Solicitors for Defendant.

[Endorsed]: Received copy of the within Motion to Dismiss and Memo. of Points & Authorities this..... day of September, 1937. I. Henry Harris, Calvin L. Helgoe, Jas. M. Naylor By Calvin L. Helgoe, attorneys for plaintiff. Filed Sep. 15, 1937. R. S. Zimmerman, Clerk By L. B. Figg, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

JOAN STORM DEZENDORF, an individual, sometimes known as Joan Storm, Plaintiff,	In Equity No. 1173-C
vs.	DECREE OF DISMISSAL WITH PREJUDICE
TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation, Defendant.	

This cause came on to be heard at this term on the 31st day of January, 1938, upon motion of the defendant to dismiss bill of complaint as amended, Jas. M. Naylor, I. Henry Harris, Jr., and Calvin L. Helgoe appearing as solicitors for plaintiff, and Alfred Wright and Gordon Hall, Jr., appearing as solicitors for defendant; and thereupon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:

1. That the motion of the defendant to dismiss the bill of complaint as amended be and the same is hereby granted.

2. That plaintiff's bill of complaint as amended be and the same is hereby dismissed with prejudice against another action.

3. That defendant have and recover of and from plaintiff its costs of suit incurred herein which are hereby taxed at $30.50.

Dated this 7th day of February, 1938.

Geo. Cosgrave
Judge of the United States
District Court.

Approved as to form, as provided in Rule 44.

JAS. M. NAYLOR
I. HENRY HARRIS, JR.
CALVIN L. HELGOE
By Calvin L. Helgoe

Decree entered and recorded 2/7/38

R. S. ZIMMERMAN,
Clerk.
By Francis E. Cross,
Deputy Clerk.

[Endorsed]: Filed Feb. 7, 1938. R. S. Zimmerman, Clerk By Francis E. Cross, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

JOAN STORM DEZENDORF, an individual, sometimes known as Joan Storm,	)	
Plaintiff,	)	
vs.	)	In Equity
	)	No. 1173-C
TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,	)	
Defendant.	)	

PLAINTIFF'S PETITION FOR APPEAL FROM DECREE DISMISSING BILL OF COMPLAINT

TO THE HON. GEORGE COSGRAVE, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA:

Joan Storm Dezendorf, an individual, sometimes known as Joan Storm, plaintiff above named, feeling herself aggrieved by the final order, judgment and decree of the above-entitled court granting the motion of the above

named defendant to dismiss the bill of complaint herein with prejudice, which said final order, judgment and decree was made and entered herein on February 7, 1938, does hereby petition for an appeal from said order, judgment and decree of dismissal with prejudice to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons and upon each and all of the grounds set forth in the assignment of errors filed herewith, and prays that her appeal may be allowed and a citation issued, directed to said defendant, Twentieth Century-Fox Film Corporation, a corporation, commanding it to appear before the said United States Circuit Court of Appeals for the Ninth Circuit, to do and receive what may appertain to justice in the premises and that a transcript of the record, proceedings and evidence in the above-entitled action, duly authenticated, may be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, or for such other, further and different order or relief, as to this Honorable Court may seem just in the premises.

JOAN STORM DEZENDORF,
By Calvin L. Helgoe
Her Attorney.

Calvin L. Helgoe
Jas. M. Naylor
I. Henry Harris
Solicitors and Attorneys for Plaintiff.

ORDER ALLOWING APPEAL

The foregoing appeal is hereby allowed upon the filing herein by said petitioner of a cost bond, conditioned as required by Section 1000 of the Revised Statutes of the United States, with sufficient sureties to be approved by this Court, in the sum of Two Hundred Fifty Dollars ($250.00).

Dated at Los Angeles, in said District, this 2nd day of May, 1938.

Geo. Cosgrave
U. S. District Judge.

[Endorsed]: Filed May 2, 1938. R. S. Zimmerman, Clerk By L. B. Figg, Deputy Clerk.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes JOAN STORM DEZENDORF, an individual, sometimes known as Joan Storm, plaintiff above named, and assigns the following and each of them as errors on which she will rely upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain final order, judgment and decree of the above-entitled court, granting defendant's motion to dismiss the bill of complaint herein with prejudice, made and entered herein on February 7, 1938.

1. That the District Court erred in dismissing said amended bill of complaint for the reason that said amended bill of complaint states facts sufficient to constitute a cause of action for infringement of plaintiff's common law copyright in her play entitled "Dancing Destiny".

2. That the District Court erred in dismissing said amended bill of complaint for the reason that said amended bill of complaint states a valid cause of action for infringement and plagiarism of plaintiff's common law copyright, in her play entitled "Dancing Destiny", against the defendant for the manufacture and public distribution of its motion picture entitled "STOWAWAY".

3. That the District Court erred in failing to order, adjudge and decree, upon comparing plaintiff's play en-

titled "DANCING DESTINY" and defendant's motion picture entitled "STOWAWAY", that:

(a) Said motion picture photoplay "STOWAWAY" was a deliberate piracy and infringement of plaintiff's play "DANCING DESTINY".

(b) That defendant illegally, unlawfully, wilfully and deliberately copied plaintiff's play "DANCING DESTINY".

(c) That defendant in manufacturing its motion picture photoplay "STOWAWAY" had copied and made use of the technique, dramatic situations and/or episodes, dramatic plot, treatment, embellishment, and detail of plaintiff's play "DANCING DESTINY".

(d) That the defendant had copied and made use of the same series of events and episodes with the conscious intention and purpose to excite by presentation and representation in the motion picture "STOWAWAY" the same emotions in the same sequence with the same casual relation as plaintiff had invented and created in her play "DANCING DESTINY".

4. That the District Court erred in dismissing said amended bill of complaint for the reason that it appears from the facts set forth in said amended bill of complaint and the exhibits attached thereto, that the defendant's motion picture photoplay "STOWAWAY" is an infringement of the plaintiff's play entitled "DANCING DESTINY".

5. That the District Court erred in rendering the decree of dismissal with prejudice entered herein on the 7th day of February, 1938 for the reason that said decree is contrary to law and the facts as stated in the amended bill of complaint.

6. That the District Court erred in not finding as a matter of law that plaintiff has been damaged by the deliberate copying and plagiarism of plaintiff's play "DANCING DESTINY" by defendant in the manufacture and public distribution of its motion picture "STOWAWAY".

7. That the District Court erred in failing to grant plaintiff the relief prayed for in the bill of complaint on file herein.

8. That the District Court erred in failing to make findings of fact and conclusions of law herein in accordance with Equity Rule 70½.

DATED this 2nd day of May, 1938.

Calvin L. Helgoe
Jas. M. Naylor
I. Henry Harris
Solicitors and Attorneys for Plaintiff.

[Endorsed]: Filed May 2, 1938. R. S. Zimmerman, Clerk By L. B. Figg, Deputy Clerk.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents

That the undersigned, Western Surety Company, doing business in the County of Los Angeles, State of California, is held and firmly bound unto TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation, appellee, in the full and just sum of Two Hundred and fifty ($250.00) Dollars to be paid to the said Twentieth Century-Fox Film Corporation, a corporation, its successor or assigns; to which payment well and truly to be made, the undersigned binds itself, its successors and assigns firmly, by these presents.

Sealed with our seals and dated this 3rd day of May, in the year of our Lord One Thousand Nine Hundred and Thirty-eight.

Whereas, lately at the District Court of the United States for the Southern District of California, Central Division, in a suit depending in said Court, between Joan Storm Dezendorf, sometimes known as Joan Storm Versus Twentieth Century-Fox Film Co*pr*oration, a corporation a Judgment was rendered against the said plaintiff, Joan Storm Dezendorf, sometimes known as Joan Storm, and the said Plaintiff, Joan Storm Dezendorf, sometimes known as Joan Storm having obtained from said District

Court for the Southern District of California an order allowing appeal to reverse the Judgment in the aforesaid suit, and a Citation directed to the said defendant, Twentieth Century-Fox Film Corporation, a corporation, citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California,

Now, the condition of the above obligation is such, that if the said plaintiff, Joan Storm Dezendorf, sometimes known as Joan Storm shall prosecute her appeal to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day and year first above written.

[Seal] Western Surety Company, a corporation
By P. F. Kirby
Vice President & Attorney-in-fact

STATE OF CALIFORNIA,)
) ss.
County of Los Angeles)

On this 3rd day of May in the year One Thousand Nine Hundred and Thirty Eight before me ....., a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared P. F. Kirby, known to me to be the duly authorized Attorney-in-Fact of WESTERN SURETY COMPANY, a South Dakota Corporation, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Company and the said P. F. Kirby acknowledged to me that he subscribed the name of WESTERN SURETY COMPANY, a South Dakota Corporation, thereto as principal, and his own name as Attorney-in-Fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] E. T. Harley
Notary Public in and for Los Angeles County, State of California.

Form of bond and sufficiency of sureties approved. May 3, 1938

Geo. Cosgrave
Judge.

[Endorsed]: Filed May 3, 1938. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR TRANSMITTING ORIGINAL EXHIBITS TO APPELLATE COURT

It is hereby stipulated and agreed by and between the above named parties, and their respective counsel, that the original exhibits listed herein shall be withdrawn from the files of the above-entitled court and of the Clerk thereof and by said Clerk be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit as part of the record on appeal herein, but none of said exhibits shall be reproduced or printed in said record.

Said original exhibits are to be returned to the files of the above-entitled court upon the determination of said appeal by said Circuit Court of Appeals. The list of said original exhibits is as follows:

(1) Copy of plaintiff's play entitled "DANCING DESTINY" annexed to the bill of complaint herein;

(2) Release print of defendant's motion picture entitled "STOWAWAY" annexed to the bill of complaint herein

Calvin L. Helgoe
Jas. M. Naylor
I. Henry Harris Jr.
Solicitors and Attorneys for Plaintiff.

Alfred Wright
Gordon Hall Jr.
Solicitors and Attorneys for Defendant.

ORDER FOR TRANSMITTING ORIGINAL EXHIBITS TO APPELLATE COURT

It appearing to the Court to be necessary and proper to transmit the above mentioned original exhibits to the United States Circuit Court of Appeals for the Ninth Circuit for its examination and inspection as part of the record on appeal herein,

IT IS HEREBY ORDERED:

That the original exhibits listed above shall be withdrawn from the files of the above-entitled court and of the Clerk thereof, and by said Clerk be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit as part of the record on appeal herein, but none of said exhibits shall be reproduced or printed in said record, and

IT IS HEREBY FURTHER ORDERED:

That the original documents so transmitted to said United States Circuit Court of Appeals for the Ninth Circuit are hereby made part of the record on appeal herein but none of said exhibits shall be reproduced or printed in said record.

DATED: May 3, 1938.

Geo. Cosgrave
Judge of the United States District Court.

[Endorsed]: Filed May 3, 1938. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL FROM DECREE GRANTING DISMISSAL WITH PREJUDICE

TO R. S. ZIMMERMAN, ESQUIRE, CLERK OF THE ABOVE-ENTITLED COURT:

YOU ARE HEREBY REQUESTED to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to an appeal from a decree of dismissal with prejudice heretofore allowed in the above-entitled proceeding, and to include in said transcript the following:

(1) Bill of Complaint;

(2) Answer of Defendant;

(3) Stipulation for filing of Motion to Dismiss;

(4) Stipulation Amending Bill of Complaint;

(5) Motion to Dismiss;

(6) Decree of Dismissal with Prejudice;

(7) Petition for Appeal from Decree of Dismissal with prejudice;

(8) Order Allowing Appeal;

(9) Assignment of Errors thereon;

(10) Bond on Appeal;

(11) Citation thereon;

(12) Stipulation and Order for Transmitting Original Exhibits to Appellate Court;

(13) The following original Exhibits, none of which is to be reproduced or printed in said Record:

(a) Copy of Plaintiff's play entitled "DANCING DESTINY" annexed to bill of complaint.

(b) Release print of Defendant's motion picture entitled "STOWAWAY" annexed to bill of complaint.

(14) This Praecipe;

(15) Clerk's Certificate.

Dated this 3rd day of May, 1938.

Calvin L. Helgoe
Jas. M. Naylor
I Henry Harris Jr
Solicitors and Attorneys for Plaintiff and Appellant.

Receipt of a copy of the within Praecipe is hereby acknowledge this 3rd day of May, 1938.

Alfred Wright
Gordon Hall Jr.
Solicitors and Attorneys for Defendant and Appellee.

[Endorsed]: Filed May 3, 1938. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of Said Court:

Sir:

Please print 40 copies only of transcript on appeal.

Calvin L. Helgoe
of Counsel for Plaintiff
639 S. Spring St.
Tr. 1224

[Endorsed]: Filed May 3, 1938. R. S. Zimmerman, Clerk By Edmund L. Smith, Deputy Clerk.

[TITLE OF DISTRICT COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 40 pages, numbered from 1 to 40 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; bill of complaint; answer; stipulation amending bill of complaint; stipulation for filing motion to dismiss; motion to dismiss; decree of dismissal; petition for appeal and order allowing appeal; assignment of errors; cost bond on appeal; stipulation and order for transmitting original exhibits and order thereon; praecipe for transcript and praecipe for copies of transcript.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of May, in the year of Our Lord One Thousand Nine Hundred and Thirty-eight and of our Independence the One Hundred and Sixty-second.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 8847

United States Circuit Court of Appeals

For the Ninth Circuit

JOAN STORM DEZENDORF,

Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,

Appellee.

BRIEF FOR APPELLANT

JAS. M. NAYLOR,
Russ Bldg.,
San Francisco, Calif.,
CALVIN L. HELGOE,
I. HENRY HARRIS, JR.,
639 So. Spring St.,
Los Angeles, Calif.,
Attorneys for Appellant.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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No. 8847

United States Circuit Court of Appeals

For the Ninth Circuit

JOAN STORM DEZENDORF,
Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,
Appellee.

BRIEF FOR APPELLANT

STATEMENT AS TO JURISDICTION.

This is an appeal from the final order, judgment and decree of the United States District Court for the Southern District of California, Central Division, dismissing with prejudice the plaintiff-appellant's* amended bill of complaint for infringement of her common law copyright in her play entitled "Dancing Destiny".

*The parties will be designated appellant and appellee throughout this brief.

There is diversity of citizenship since, as the bill of complaint alleges, appellant is a citizen of the United States and a resident of the City of Los Angeles, County of Los Angeles, and State of California (Par. I), and appellee is a corporation organized and existing under and by virtue of the laws of the State of New York, having a regularly established place of business in the City of Los Angeles, County of Los Angeles, and State of California, and in the Central Division of the United States District Court for the Southern District of California (Par. II) (Tr. 4-5).

This is a suit of a civil nature in equity for infringement of common law copyright, between citizens of different states, wherein the matter in controversy exceeds, exclusive of interest and costs the sum or value of Three Thousand Dollars ($3,000.00) (Bill of Complaint, Par. III, Tr. 5).

The bill of complaint also alleges that appellant, prior to January 1, 1934, created, originated, invented and wrote a new and novel play entitled "Dancing Destiny" (Bill of Complaint, Par. IV, Tr. 5); that said play was written as an original and independent undertaking by appellant, the author thereof, and contains a large amount of matter wholly original with appellant, and constitutes copyrightable subject matter, according to the common law of copyright (Bill of Complaint, Par. V, Tr. 5); that since writing said play appellant has maintained the same in unpublished form and as a result thereof there was secured to her under the common law of copyright, the right as author and proprietor of an unpublished work to prevent the copying, publishing or use of such unpub-

lished work without her consent (Bill of Complaint, Par. VII, Tr. 5-6); the delivery of the manuscript of appellant's play to appellee pursuant to negotiations, the first rejection thereof by appellee and the return thereof to appellant, a second submission of the manuscript to appellee pursuant to appellee's request and a second rejection thereof by appellee (Bill of Complaint, Par. VII, Tr. 6); the appellee's knowledge of appellant's authorship and proprietorship of the play "Dancing Destiny", her copyright title thereto, and that for motion picture purposes said literary property and dramatic play under the common law of copyright belonged to and was possessed by appellant (Bill of Complaint, Par. VIII, Tr. 6), and the manufacture of the motion picture entitled "Stowaway" by appellee notwithstanding the foregoing facts (Bill of Complaint, Par. IX, Tr. 6-7).

The charge of infringement is contained in Paragraphs X, XI and XII of the bill of complaint (Tr. 7-8).

PROPER JURISDICTION ALLEGED AND SHOWN.

The District Courts of the United States have original jurisdiction of suits in equity arising under the common law of copyright as between citizens of different states, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

United States Constitution, Article 3, Section 2, Clause 1;

Judicial Code, Sec. 24; U. S. C. title 28, Sec. 41.

An appeal may be allowed by a judge of the District Court or of the Circuit Court of Appeals.

Judicial Code, Sec. 132; U. S. C. title 28, Sec. 228.

The Circuit Courts of Appeals have appellate jurisdiction to review by appeal or writ of error final decisions:

> "First. In the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

Judicial Code, Sec. 128; U. S. C. title 28, Sec. 225.

The appellant's petition for appeal from the final order, judgment and decree of the court below was allowed by the District Court on May 2, 1938 (Tr. 27-29) and the bond thereon was approved (Tr. 33-35). The citation on appeal (Tr. 2) thereafter issued and was filed in this court on May 24, 1938, as a part of the record.

STATEMENT OF THE CASE.

This appeal (assignment of errors 3 and 4) (Tr. 30-31) raises the question of whether appellee, in the manufacture and distribution of its motion picture "Stowaway", copied appellant's play "Dancing Destiny" and thereby infringed her common law copyright therein.

If it be found that appellee copied appellant's play "Dancing Destiny" and thereby infringed her common law copyright therein, then it must follow that the amended bill of complaint states facts sufficient to constitute a valid cause of action for infringement of common law copyright; that the decree of dismissal with prejudice is

contrary to law and the facts stated in the amended bill of complaint; that appellant has been damaged by the deliberate copying and plagiarism of her play by appellee in the manufacture and public distribution of its motion picture, and that appellant should have been granted the relief prayed for in the bill of complaint, as set forth in assignment of errors 1, 2, 5, 6 and 7 (Tr. 30 and 32).

The appeal (assignment of errors 8) also raises the question of whether the District Court erred in failing to make findings of fact and conclusions of law herein in accordance with Equity Rule 70½.

SPECIFICATION OF ERRORS TO BE RELIED ON.

The appellant here relies upon the following assignment of errors, grouped for the purposes of argument in the manner indicated:

A—3a, b, c and d and 4. (Tr. 30-31).

B—8. (Tr. 31).

ARGUMENT.

A.

ASSIGNMENT OF ERRORS.

3. That the District Court erred in failing to order, adjudge and decree, upon comparing plaintiff's play entitled "Dancing Destiny" and defendant's motion picture entitled "Stowaway", that:

   (a) Said motion picture photoplay "Stowaway" was a deliberate piracy and infringement of plaintiff's play "Dancing Destiny".

   (b) That defendant illegally, unlawfully, wilfully and deliberately copied plaintiff's play "Dancing Destiny".

   (c) That defendant in manufacturing its motion picture photoplay "Stowaway" had copied and made use of the technique, dramatic situations and/or episodes, dramatic plot, treatment, embellishment, and detail of plaintiff's play "Dancing Destiny".

   (d) That the defendant had copied and made use of the same series of events and episodes with the conscious intention and purpose to excite by presentation and representation in the motion picture "Stowaway" the same emotions in the same sequence with the same casual relation as plaintiff had invented and created in her play "Dancing Destiny".

4. That the District Court erred in dismissing said amended bill of complaint for the reason that it appears from the facts set forth in said amended bill of complaint and the exhibits attached thereto, that the defendant's motion picture photoplay "Stowaway" is an infringement of the plaintiff's play entitled "Dancing Destiny".

The question of copying and infringement, raised by the foregoing assignment of errors, will be discussed under the following headings:

A(1) The effect of appellee's motion to dismiss.

A(2) Originality of appellant's play admitted.

A(3) Access by appellee to appellant's play admitted.

A(4) A comparison of the appellant's play and appellee's motion picture.

A(5) The test of copying in cases of this kind.

A(6) The degree of copying in the present case.

A(7) Whole work need not be copied to support charge of infringement.

A (1) The effect of appellee's motion to dismiss.

The bill of complaint in the above-entitled cause alleges that appellant prior to January 1, 1934, created, originated, invented and wrote a new and novel play entitled "Dancing Destiny"; that the said play was an original independent undertaking by appellant and contains a large amount of matter wholly original with her as the author thereof; that the same constitutes copyrightable subject matter, according to the common law of copyrights; that since writing the play appellant has maintained the same in unpublished form and as a result thereof there was secured to her under the common law of copyright the right as author and proprietor of an unpublished work to prevent the copying, publishing or use of such unpublished work without her consent; that appellant caused a manuscript of her play entitled "Dancing Destiny" to be delivered to appellee; that said appellee rejected said manuscript; that at the request of the appellee the appellant again submitted the manuscript of the play to appellant and that said manuscript was again rejected (Paragraphs 4 to 7, inclusive, Tr. 5-6).

The bill of complaint then charges the appellee with the manufacture of a picture entitled "Stowaway", alleged to

be a deliberate piracy and infringement of appellant's play; that in the making of same the appellee copied appellant's play; that appellee copied and made use of the same technique, dramatic situations and/or episodes, dramatic plot and its treatment, embellishment and detail; and further that appellee copied and made use of the same series of events and episodes with a conscious intention and purpose to excite by presentation and representation in its picture entitled "Stowaway" the same emotions in the same sequence with the same casual relation as appellant created in her play "Dancing Destiny". (Paragraphs 9 and 10, Tr. 6-7). Then follows the allegations that appellant had not at any time granted to appellee any right, license or privilege to produce her play or to make any dramatization of any character whatsoever in picture form of said play.

Prior to the filing of appellee's motion to dismiss the parties herein stipulated (Tr. 21) that the bill of complaint be amended by filing a copy of plaintiff's play entitled "Dancing Destiny" and a release print of defendant's motion picture entitled "Stowaway" with the provision that both should be deemed to be annexed to said bill of complaint as schedules thereto and incorporated therein with the same force and effect as though originally included therein as integral parts thereof.*

Thereafter, by stipulation (Tr. 22) the parties agreed to proceed by way of motion to dismiss as a means of bring-

*The appellant's play "Dancing Destiny" and the release print of appellee's motion picture entitled "Stowaway" were transmitted to this Court as original exhibits pursuant to a stipulation of the parties (Tr. 36) and an order of the Court below (Tr. 37).

ing the cause on for hearing, the said motion to be based and to be considered upon the amended bill of complaint, unaffected by any admission, denial or allegation contained in the answer (Tr. 12-20) theretofore filed by defendant. The motion to dismiss (Tr. 23-24) was filed on September 15, 1937.

It is elementary that on a motion to dismiss, the allegations of material facts which are well pleaded in the bill are accepted as true for the purposes of the motion. See

Kansas v. Colorado, 185 U. S. 126; 46 L. Ed. 838; 22 S. Ct. 552;

Arizona v. California, 283 U. S. 423, 463; 75 L. Ed. 1154, 1170; 51 S. Ct. 522;

Simkins Federal Practice, Rev. Ed., Section 648.

Thus the only question raised by the motion was that of infringement, involving a comparison of appellant's play and appellee's motion picture.

A (2) Originality of appellant's play admitted.

In view of the accepted rule there can be no serious question that the effect of the filing of the motion to dismiss constituted an admission upon the part of appellee that appellant's play was and is original. Certain it is that the appellee is debarred from offering any evidence to the contrary. Had it been appellee's desire to question the originality of appellant's play it should not have proceeded by way of motion to dismiss but should have relied upon Paragraph 2 (Tr. 12) and Paragraph 6 (Tr. 15-18) of its answer and proofs properly adduced thereunder.

A motion to dismiss in a copyright case admits originality for the purpose of the motion, just as in a patent

case a motion to dismiss admits the validity of the patent in suit. See

Caesar v. Jos. Pernick Co. Inc., 1 Fed. Supp. 290.

A (3) Access by appellee to appellant's play admitted.

The bill of complaint alleges (Par. VII, Tr. 6) that on two separate occasions, prior to the making of appellee's motion picture entitled "Stowaway" appellant submitted her play "Dancing Destiny" to appellee for consideration and that the same was thereafter twice rejected.

The effect of the motion to dismiss is to admit the truth of these facts and thereby establish appellee's access to appellant's play, leaving only the question of infringement to be determined. Cf. *Caesar v. Jos. Pernick Co., Inc.*, supra. In other words, appellee having filed a motion to dismiss must be deemed to have waived any other defenses it may have in preference to a test of the case on the naked question of infringement. As heretofore stated, this involves merely a comparison of the works.

A (4) A comparison of the appellant's play and appellee's motion picture.

Comparison of appellee's motion picture play with appellant's play leads to the inescapable conclusion that there has been infringement. In both picture and play the locale of the opening of the story is a Chinese village and the principal character is a little girl. In the play the child is "Desiree", daughter of a young American missionary whose wife is a character in the play; in the picture she is "Barbara", an orphan under the guardianship of a relative (Alfred Kruikshank). Her parents had been killed while on duty at a post in China. In both

picture and play the child speaks or learns to speak Chinese fluently and is or soon becomes familiar with the customs. In both picture and play the child has a close friend and admirer in a Chinese gentleman of considerable station. In the picture it is Sun Low, the village magistrate, while in the play it is Li Ling Chi, a wealthy Chinese merchant, and in each instance this character is or has been an intimate friend of the child's parents.

In both picture and play the locale of the story shifts from the village to a seaport. In the former the child is sent to Shanghai on a boat by her Chinese friend, accompanied by a male servant, to stay with the magistrate's brother, in fear of an impending bandit raid on the village. In the play the child and her parents leave on a trip to Hong Kong by boat, as the guests of, and accompanied by, the Chinese merchant and his small daughter, the playmate of the principal character.

In the picture the child is deserted by the Chinese servant who makes off with the money while en route to Shanghai. In the play the party is captured by Chinese bandits. All, including the principal character's parents, are killed save the two children. The children hide on a riverboat and eventually make their way to Hong Kong. It is significant that the parallel developments of picture and play bring about a situation in which the principal character, **an orphan**, is on a boat approaching a Chinese seaport, without adult friends.

In the picture, upon reaching Shanghai, the principal character meets Tommy Randall, a young American **bachelor**, in a Chinese store and through her knowledge of Chinese aids him in making a purchase. She hides in his car

which is taken aboard a **steamer,** and eventually comes under Randall's care. In the play the child comes under the influence of Winston Hathaway, a young English **bachelor,** while on a river boat approaching Hong Kong. Following a misunderstanding with two friends, one a young American bachelor, the other, Ruth Stevens, a young English woman of whom he is enamored, Hathaway takes passage on a **steamer** bound for England, accompanied by the principal character, having theretofore announced his intention of so doing to the American Consul.

In both play and picture the young bachelors meet American friends in the seaports and in each instance the child and her present and future care are discussed.

The action of the picture continues on shipboard, bound for Bangkok. The child, regarded as a stowaway, brings about a meeting between Randall and Susan, a young American girl. Randall's English **butler,** Atkins, takes a prominent part in the care and entertainment of the child. Susan is on her way to Bangkok to marry a young American. He is accompanied by her fiance's mother. The boat reaches Hong Kong. Susan's fiance, in response to his mother's cable flies there. There are incidents ashore at Hong Kong. When once more aboard ship the captain advises Randall of receipt of wire from the American Consul that child will be taken into his care and placed in orphanage. To forestall this Randall persuades Susan to marry him so they can adopt the child. This they do, planning to institute divorce proceedings upon arriving in the United States, their purpose in temporarily taking care of the orphaned child having been accomplished. The scene

shifts to a courtroom in Reno. The child takes the stand as a witness in the divorce action and it is through her testimony the divorce is denied and an agreeable "**reconciliation**" is effected.

In the play, the scene shifts from Hong Kong to England. Hathaway takes the child to the home of his parents, who are estranged. The child wins the affection of the parents, and, through their mutual admiration of her, they are **reconciled.** Reconciliation is also effected between Hathaway and Ruth Stevens, with whom the misunderstanding had been had in Hong Kong, through the action of the child and the young American friend who has come on from Hong Kong. The Hathaways also have a **butler,** Hawkins, who becomes attached to the child and unbends to join her childish pranks. An American relative of the child, upon being deceived, relinquishes all claim to guardianship and urges Hathaway's adoption of her.

The lowest common denominator of play and picture is a little girl in a small Chinese village, befriended by a Chinese gentleman of station; her journey from an inland village by riverboat to a Chinese seaport; her being left alone en route by similar calamities; her being thrust into the care of a young bachelor through these circumstances, her attachment for the bachelor as her natural guardian, an ocean voyage; her attachment for a butler employed by the bachelor or his family, and the fact that she unwittingly brings about a love affair between the young bachelor and a third party.

It is believed that the foregoing analytical comparison of play and picture indicates that in the making of the picture appellee copied appellant's story. There being

originality in appellant's play and appellee having had access thereto, as admitted by the motion to dismiss, it is not singular that there are so many similarities as to characters, dramatic situations, episodes, technique, dramatic plot and modification of characters and we submit this leads to the inescapable conclusion that the appellant's play has been copied and her common law copyright therein infringed.

A (5) The test of copying in cases of this kind.

The test of copying, in a case calling for comparison of a motion picture with a play or story, has been clearly and succinctly set forth by this Court in *Harold Lloyd Corporation v. Witwer,* 65 Fed.(2d) 1, in which, at page 18, it was said:

> "The question really involved in such comparison is to ascertain the effect of the alleged infringing play upon the public, that is, upon the average reasonable man. **If an ordinary person who has recently read the story sits through the presentation of the picture, if there had been literary piracy of the story, he should detect that fact without any aid or suggestion or critical analysis by others.** The reaction of the public to the matter should be spontaneous and immediate." (Emphasis supplied).

Another test, quoted with approval by this Court in *Harold Lloyd Corporation v. Witwer,* supra, is that given in 13 C. J. 1113, Section 276 Note 30 (quoting from *White-Smith Music Pub. Co. v. Apollo Co.,* 209 U. S. 17, 28 S. Ct. 319, 52 L. Ed. 655, 14 Ann. Cas. 628):

> "A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original."

It is submitted that the "average reasonable man", upon reading appellant's play and seeing appellee's picture, would detect the fact that the former had served, in a substantial degree, as a source of the material in the latter, and that there had been literary piracy.

A (6) The degree of copying in the present case.

Appellant does not contend that her entire story was appropriated in the making of appellee's motion picture. On the contrary it is appellant's contention that a material and critical portion of her work was used. Appellant concedes that it is a rare thing to find infringement which is 100% complete. The authorities take a similar view for it was said in *Dam v. Kirk LaShelle Co.* (C. C. A. 2) 175 Fed. 902, 41 L. R. A. (N. S. 1002, 20 Ann. Cas. 1173):

> "It is impossible to make a play out of a story—to represent a narrative by dialog and action—without making changes, * * *."

Appellant contends that in making its motion picture "Stowaway" appellee copied the characterizations, technique, dramatic situations, episodes, dramatic plot and treatment, embellishment and detail or series of events which occur in her story. We have seen that the underlying theme of play and picture runs a parallel course through a substantial and critical portion of the two works and while a fork in the road is reached that fact is not surprising nor decisive. On the contrary, where the characterizations as a whole achieve results as analogous as they do here, slight differences in endings may be attributable to a desire upon the part of the infringer to avoid identity (cf. *Dam v. Kirk LaShelle Co.,* supra).

A (7) Whole work need not be copied to support charge of infringement.

Appellant has heretofore pointed out that appellee has not taken the whole of her story but she contends that a material and critical portion thereof was appropriated. It is well settled law that such partial appropriation will constitute infringement. A leading case, and appellant's principal authority is *Sheldon et al. v. Metro-Goldwyn-Pictures Corp. et al.*, 81 F.(2d) 49 (C. C. A. 2nd).

This was a suit to enjoin defendants' picture play as an infringement of plaintiffs' copyrighted play. Plaintiffs' title was conceded. So too was validity. Infringement was the only question.

The facts were, briefly, these: the defendants had seen a play written by plaintiffs based on a cause celebre in Scotland, and were anxious to secure the rights to make a motion picture. The Will Hay's organization objected on the grounds of obscenity. This objection was not overcome and plaintiffs' manuscript was returned.

Subsequently, a novel written by an English woman, based on the same **cause celebre**, was suggested to defendants and they purchased the rights to it. Defendants assigned the preparation of a play therefrom to an author in its employ, having in mind a certain actress. This author, and those selected to assist him, had seen and read plaintiffs' play. They denied they had used plaintiffs' play in any way whatever, and agreed they had used the original incident of the cause celebre and the novel purchased by defendants from the English woman.

To meet these denials the plaintiffs appealed to the substantial identity between passages in the picture and those parts of the play which were original with them.

The court made these observations in comparing the picture and the play:

> "Coming to the parallelism of incident, the threat scene is carried out with almost exactly the same sequence of event and actuation; it has no prototype in either story or novel. Neither Ekebon nor L'Angelier went to his fatal interview to break up the new betrothal; he was beguiled by the pretence of a renewed affection. Moreno and Renaul each goes to his sweetheart's home to detach her from her new love; when he is there, she appeals to his better side, unsuccessfully; she abuses him, he returns the abuse and commands her to come to his rooms; she pretends to agree, expecting to finish with him one way or another. True, the assault is deferred in the picture from this scene to the next, but it is the same dramatic trick. Again, the poison in each case is found at home, and the girl talks with her betrothed just after the villain has left and again pledges him her faith. Surely the sequence of these details is pro tanto the very web of the author's dramatic expression; and copying them is not "fair use".

The court held there had been infringement, reversing the decree of the trial court and ordered an injunction, damages and an accounting as prayed. Speaking through Judge Learned Hand, it said:

> "We must therefore state in detail those similarities which seem to us to pass the limits of 'fair use'. Finally, in concluding as we do that the defendants used the play pro tanto, we need not charge their witnesses with perjury. With so many sources before them they might quite honestly forget what they took; nobody knows the origin of his inventions;

memory and fancy merge even in adults. Yet unconscious plagiarism is actionable quite as much as deliberate. Buck v. Jewell-La Salle Realty Co., 283 U. S. 191, 198, 51 S. Ct. 610, 75 L. Ed. 971, 76 A. L. R. 1266; Harold Lloyd Corporation v. Witwer, 65 F.(2d) 1, 16 (C. C. A. 9); Fred Fisher, Inc. v. Dillingham (D. C.) 298 F. 145."

* * * * * * *

"**We have often decided that a play may be pirated without using the dialogue.** Daly v. Palmer, Fed. Cas. No. 3,552, 6 Blatch. 256; Daly v. Webster, 56 F. 483, 486, 487; Dam. v. Kirke La Shelle Co., 175 F. 902, 907, 41 L. R. A. (N. S.) 1002, 20 Ann. Cas. 1173; Chappell & Co. v. Fields, 210 F. 864; Dymow v. Bolton, 11 F. (2d) 690; and Nichols v. Universal Pictures Corporation, supra, 45 F.(2d) 119, do not suggest otherwise. **Were it not so, there could be no piracy of a pantomime, where there cannot be any dialogue; yet nobody would deny to pantomime the name of drama.** Speech is only a small part of a dramatist's means of expression; he draws on all the arts and compounds his play from words and gestures and scenery and costume and from the very looks of the actors themselves. Again and again a play may lapse into pantomime at its most poignant and significant moments; a nod, a movement of the hand, a pause, may tell the audience more than words could tell."

* * * * * * *

"The play is the sequence of the confluence of all these means; bound together in an inseparable unity; it may often be most effectively pirated by leaving out the speech, for which a substitute can be found, which keeps the whole dramatic meaning. That as it appears to us is exactly what the defendants have done here; the dramatic significance of the scenes we have recited is the same, almost to the letter. **True,**

> **much of the picture owes nothing to the play; some of it is plainly drawn from the novel; but that is entirely immaterial; it is enough that substantial parts were lifted; no plagiarist can excuse the wrong by showing how much of his work he did not pirate.** We cannot avoid the conviction that, if the picture was not an infringement of the play, there can be none short of taking the dialogue." (Emphasis supplied).

A "structural grouping of incidents", if new, is infringed by a parallel grouping of incidents. See *Loewenfels v. Nathan, et al.* (S. D. N. Y. 1932), 2 F. Supp. 73, 80, wherein it was said:

> "What was protected by the plaintiff's copyright was only that which was original to him, i.e., the grouping of incidents in such manner that his work presented a new conception or a novel arrangement of events * * *."

In *Nichols v. Universal Pictures Corp.,* 45 F.(2d) 119, Judge Learned Hand had this to say:

> "It is of course essential to any protection of literary property, whether at common-law or under the statute, that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations. That has never been the law, * * * when plays are concerned, the plagiarist may excise a separate scene (citing cases); or he may appropriate part of the dialogue (citing cases)."
>
> * * * * * * * *
>
> "But we do not doubt that two plays may correspond in plot closely enough for infringement."

See *Daly v. Palmer,* Fed. Cas. 3,552, 6 Fed. Cas. 1133, 1136 (S. D. N. Y. 1868) holding a single scene (here a

railroad incident) may be the subject matter of valid copyright and infringed where that in which the whole merit of the scene consists was incorporated in another work without material alteration in the constituent parts of the series of events, or in the sequence of the events in the series.

See also:

Chappell & Co., Ltd., et al. v. Fields, et al., 210 F. 864 (C. C. A. 2nd 1914);

Weil, Copyright Law, Sec. 187.

In

Dam v. Kirk LaShelle Co., (C. C. A. 2) 175 Fed. 902, 41 L. R. A. (N. S. 1002, 20 Ann. Cas. 1173),

the court recognized the obligation to protect one who prepared the framework of a play, saying:

> "The story was but a framework * * *but the right given to an author to dramatize his work includes the right to adopt it for presentation upon the stage which must necessarily involve changes, additions, and omissions. It is impossible to make a play out of a story—to represent a narrative by dialogue and action—without making changes, and a playwright who appropriates the theme (plot) of another's story cannot, in our opinion, escape the charge of infringement by adding to or slightly varying his incidents."

In the present case, we submit, there has been that degree of copying which the authorities recognize as infringement of copyright.

B.

ASSIGNMENT OF ERRORS.

8. That the District Court erred in failing to make findings of fact and conclusions of law herein in accordance with Equity Rule 70½.

The court below entered a decree of dismissal with prejudice (Tr. 25-26) following the hearing on the motion to dismiss. This was a final, appealable order. Despite this fact, findings of fact and conclusions of law were not made in accordance with Equity Rule 70½. Consequently, neither the appellate Court nor the parties hereto have any means of ascertaining upon what the District Court based its dismissal of the bill of complaint.

In *Louisville & N. R. Co. v. U. S.*, 10 F. Supp. 185 (D. C. N. D. Ill. E. D. (1934)), the court took the position that the requirements of the rule are mandatory and findings of fact and conclusions of law must be made though the record consists only of pleadings, certain exhibits attached to the complaint and on affidavit by defendant, no evidence having been offered by either side. Cf. *Parker v. St. Sure*, 53 F.(2d) 706 (C. C. A. 9) from which it may be inferred that findings in some form are required by rule 70½.

CONCLUSION.

In summary, appellant contends that the bill of complaint, as amended by annexation of the exhibits, does state a valid cause of action and infringement of her common law copyright is thereby shown. It was error, therefore, for the District Court to dismiss the bill of

complaint. Likewise it was error for the trial Court to ignore Equity Rule 70½ and the requirement therein by failing to make findings of fact and conclusions of law.

Appellant submits that the record shows that she is the author of an original story in which she has common law rights; that, for the purposes of the motion to dismiss, these facts and likewise appellee's access thereto, are to be deemed admitted; that a comparison of the motion picture and the play lead to the conclusion appellee without consent or license copied portions of the play and produced a picture embodying, in a substantial degree, the same dramatic situations, plot, treatment, embellishment and detail and characters, and thereby infringed appellant's common law copyright.

Wherefore, it is respectfully prayed that the judgment of the District Court should be reversed in order that justice may be done in the premises.

Dated, San Francisco, California,

June 21, 1938.

Respectfully submitted,

Jas. M. Naylor,

Calvin L. Helgoe,

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Attorneys for Appellant.

No. 8847

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

JOAN STORM DEZENDORF,

Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,

Appellee.

BRIEF FOR APPELLEE.

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No. 8847

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JOAN STORM DEZENDORF,

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vs.

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Appellee.

BRIEF FOR APPELLEE.

This appeal has been taken from a decree of the District Court of the United States for the Southern District of California, Central Division, dismissing with prejudice appellant's bill in equity as amended pursuant to stipulation and order, the decree having been made and entered upon the making of an order granting appellee's motion to dismiss. The District Court allowed the appeal on May 2, 1937 [Tr. pp. 27-29] upon an assignment of errors set forth on pages 30-32 of the transcript.

The Pleadings.

The allegations of appellant's bill are succinctly summarized on pages 2 and 3 of her brief. It purports to state a cause of action for the infringement of those rights commonly characterized as "common law copyright", which, in California, are conferred upon the authors of products of the mind by section 980 of the Civil Code. The jurisdiction of the District Court was based upon diversity of citizenship, the suit being one in equity between a citizen of California and a citizen of New York, wherein the matter in controversy is alleged to be in excess of $3,000.00. Appellee filed an answer which is of no consequence whatsoever upon this appeal, for it was, in effect, withdrawn for present purposes from the consideration of the court by a stipulation and order permitting appellee to file its motion to dismiss the bill (amended pursuant to the stipulation and order hereinafter mentioned), and providing that the motion was to be based and should be considered and determined upon the bill as amended, unaffected by any admission, denial or allegation contained in the answer theretofore filed. [Tr. p. 22.]

The stipulation and order amending the bill provided that the bill might be amended "by the filing with the clerk of the above entitled court of a copy of plaintiff's play entitled 'Dancing Destiny' and a release print of defendant's motion picture entitled 'Stowaway', which should both be deemed to be annexed to said bill of complaint as schedules thereto and incorporated therein with the same force and effect as though originally included therein as integral parts thereof." [Tr. p. 21.]

This course was followed by the parties in order to enable them to take advantage of the expeditious method so successfully employed in the United States courts in

New York for the determination of matters of this nature upon a motion to dismiss made upon the ground that a comparison of the plaintiff's and defendant's respective works would affirmatively show, as a matter of law, no actionable appropriation of copyrightable elements. Appellee filed its motion to dismiss the bill of complaint, amended as aforesaid, upon the grounds set forth on pages 23 and 24 of the transcript which urge in terms that the bill, as amended, fails to state a cause of action and shows that plaintiff has neither done, nor suffered to be done, anything constituting an infringement of any rights of plaintiff in or to the play entitled "Dancing Destiny".

Effect of Amendment of Bill and Scope of Motion to Dismiss.

The annexation to the bill of the plaintiff's and defendant's respective literary works enables the court to determine the question of infringement, by the pragmatic method of comparing the two works themselves, as approved in *Nichols v. Universal Pictures Corporation,* C. C. A. 2 (1930), 45 Fed. (2d) 119, the standard of the ordinary observer being applied. (*Harold Lloyd Corporation v. Witwer,* C. C. A. 9, 65 Fed. (2d) 1; *Dymow v. Bolton,* C. C. A. 2 (1926), 11 Fed. (2d) 690.)

The procedure makes it possible to bring the matter before the court on a summary motion to dismiss and it has been characterized as an "economic, convenient, and prompt method" of dealing with these causes "when it is not desired—at least initially—to dispute access, but only to dispute any unfair use of the copyrighted work by the alleged infringer".

> *Shipman v. R. K. O. Radio Pictures, Inc.,* D. C. N. Y. (1937), 20 Fed. Supp. 249.

As pointed out in *Lowenfels v. Nathan,* D. C. N. Y. (1932), 2 Fed. Supp. 73, this practice achieves its purpose "because the annexation of these two books to the complaint prevents this motion to dismiss from being involved in any awkward admissions or conclusions of fact such as the above mentioned allegations of plagiarism and copying by the authors of 'Of Thee I Sing' from the second act of 'United States With Music' because the annexation of the two books constitutes an amendment to the complaint which supersedes by the realities the allegations of conclusions of fact which I have mentioned."

The scope and implications of the practice are outlined in *Shipman v. R. K. O. Radio Pictures, Inc., supra,* as follows:

> "The practice followed is, in effect, a motion by the defendant for a summary decree of dismissal, and on such a motion the works themselves supersede and control any allegations of conclusions of fact about them or descriptions of them which may be contained in the complaint. *Cf. Lowenfels v. Nathan* (D. C.), 2 F. Supp. 73, at page 74. The situation is, indeed, as defendant's counsel aptly suggests, similar in its effect to the annexation to a complaint, by amendment or otherwise, of a contract, when of course the terms of the contract itself would juridically override any allegations about its construction or effect. For courts deal with the actualities of situations before them, not with interested comments thereon."

Consequently, the motion to dismiss admits the truth of the facts well pleaded in the complaint, except those facts or allegations which are superseded by the amendment incorporating the two works into the bill. Appellee's motion accordingly admits that appellant created and wrote a play entitled "Dancing Destiny"; that she has at all times maintained the same in unpublished form; that she delivered her play to appellee on two separate occasions, on each of which the manuscript was subsequently returned to her by appellee; that appellee produced a motion picture entitled "Stowaway" which it distributed for profit; that appellee had knowledge that appellant was the owner and proprietor of the play "Dancing Destiny" and that appellant at no time granted appellee any right, license or privilege to produce the same in motion pictures.

What Questions Are Properly Before the Court.

Appellant appears to contend in her brief that the motion to dismiss admits the *originality* or novelty of her work., *i. e.,* the allegation contained in paragraph 5 of the bill "that the said play was written as an original and independent undertaking by said plaintiff, the author thereof, as aforesaid, and contains a large amount of matter wholly original with the said author thereof, and constitutes copyrightable subject matter, according to the common law of copyright". [Tr. p. 5.] In this she mistakes the proper scope of the inquiry in the court below as prescribed by the authorities hereinbefore cited. These allegations concerning originality and copyrightability are conclusions

of fact "which are superseded by the realities"—to paraphrase *Lowenfels v. Nathan, supra,*—for the court deals "with the actualities of situations before them, not with interested comments thereon. (*Shipman v. R. K. O. Radio Pictures, Inc., supra.*)

The question of originality, in the sense of novelty of treatment, entitling the author to the protection of the common law or of the copyright statute is just as definitely before the court for determination as is the question of infringement.

In *Caruthers v. R. K. O. Radio Pictures, Inc.,* D. C. N. Y. (1937), 20 Fed. Supp. 906, which was a suit in equity for the alleged infringement of a *common law copyright,* the court, granting a motion to dismiss, said:

> "The inquiry in causes of this kind when access is proved, or admitted, as it is here for the purposes of this motion, is always: (1) What, if anything, the defendant has appropriated; (2) if he did appropriate anything, whether what he took was copyrightable material; and (3) if so, whether it was a substantial and material part of the copyrighted work, playing a role of consequences therein. *Cf. Dymow v. Bolton,* 11 Fed. (2d) 690, 691 (C. C. A. 2); *Wilson v. Haber Bros.,* 275 Fed. 346, 347 (C. C. A. 2); *Rush v. Oursler* (D. C.), 39 Fed. (2d) 468, 472; *Chatterton v. Cave,* 3 App. Cases 497; *Drone on Copyright* at page 415."

In that case, the court decided that such incidents, occurring in plaintiff's unpublished manuscript, as were du-

plicated in defendant's motion picture were wholly lacking in originality and were "familiar to all readers of stories of the western frontier and the rough life led thereon by its earlier settlers". The alleged duplication of plaintiff's characters was dismissed by the court in these words, "The characters therein are without such distinctive qualities as to be a *sine qua non* of their copyrightability".

In the *Shipman* case, *supra*, the court pointed out:

> ". . . access to the plaintiff's works is, obviously, not fatal to the defense (citing cases) for the additional question always is whether, having access, the defendant has made unfair use of a sufficient amount of the plaintiff's copyrightable matter to justify a holding of infringement." (Citing cases.)
>
> "If what the alleged infringer took was not copyrightable, the copyright owner may not complain, although his work may have been what directly inspired the work of the infringer."

The questions involved on this appeal, therefore, require a determination from a comparison of the two works, of the following questions:

(1) What elements of similarity exist between appellant's work and appellee's motion picture?

(2) In which of such elements can appellant have rights of ownership?

(3) If any elements belonging to appellant were taken, was the appropriation a material part of her work?

ARGUMENT.

I.

The Elements of Similarity That Exist Between Appellant's Play and Appellee's Picture.

In considering those elements of similarity that may exist between the two works involved in this suit it is well to bear in mind the fact that both the play and picture portray stories, the construction and treatment of which are as trite and old in the realm of literature as the story of Cinderella. In fact, the stories in both play and picture are but a slight variation of the Cinderella theme.

A careful analysis of both works discloses, at most, the following general similarities:

(a) A more or less precocious American child heroine, with the ability to sing, dance and speak Chinese, whose adventures begin in China and who is under the influence of missionaries.

(b) An escape by the child from Chinese bandits.

(c) The finding, by the child, with the aid of an old Chinese gentleman, of someone to care for her.

(d) A bachelor's meeting with American friends in a Chinese seaport.

(e) The departure of the child from China on a steamer.

(f) The culmination of a romance between a bachelor and a girl.

(g) The friendship and sympathy of the child with all persons with whom she comes in contact, including serv-

ants, and the ripening of a better understanding between a man and a woman through their love for the child.

The variation of the Cinderella theme to which we have referred may, in the light of the current popularity of a famous child star in motion pictures, be appropriately designated as the Shirley Temple theme, in the development of which the accepted and apparently required factors involve, first, an opportunity for the star to display her histrionic talents; second, assorted incidents or sequences of incidents that endanger the child's safety or happiness, creating excitement and suspense; third, a role for the child star in which she wins and is loved by all of those characters in the story with whom she comes in contact; fourth, an older character or characters, usually of a philosophic and paternal bent, whose friendship with the child is calculated to lead to either humorous or sympathetic reactions on the part of the audience and, fifth, some form of so-called "love interest" influenced, ripened or brought to fruition by the activities of the child (usually uncalculated by her to accomplish the result). Whether a more original theme or plot could or could not be devised for such pictures is inconsequential, since the fact remains that on the stage, as well as on the screen, the formula has been well known and not only accepted but generally followed for many years.

Studying the comparison of appellant's play and appellee's picture contained in the brief for appellant, it appears that counsel lay special emphasis upon the following elements, pointed out as being similar in each story, viz., an orphan, a bachelor, a steamer, a butler (in the picture it is a valet, not a butler) and a reconciliation. Given the well-known prescription for a play or story involving a child, saved from misfortune and living happily ever after

in comfortable circumstances, it is difficult to imagine how either story could end with the usual and expected denouement without the presence of most, if not all, of these (or substantially the same) ingredients.

II.

In Which, If Any, Elements of Similarity Between the Two Works has Appellant Any Rights of Ownership?

Upon a consideration of the elements of similarity that have been noted, it appears obvious that neither their combination into a story theme, nor any one of them separately, can be the subject of property in which the appellant may acquire exclusive ownership by virtue of either statutory or common law copyright.

The extent to which the courts will protect the particular result obtained from the weaving of a combination of incidents into a story theme is well defined in the case of *Roc-Lawton v. Hal E. Roach Studios, et al.,* D. C., Cal. (1927), 18 Fed. (2d) 126, the quoted portion of the decision indicating the facts sufficiently to illustrate the point involved. In that case Judge James said:

> "It is intimated in some decisions that the appropriation of a theme violates an author's copyright. In its ordinary meaning, a theme is understood to be the underlying thought which impresses the reader of a literary production, or the text of a discourse. Using the word 'theme' in such a sense will draw within the circle of its meaning age-old plots, the property of everyone, and not possible of legal appropriation by an individual. It is the theme presented in an original way—with novelty of treatment or embellishment—which becomes the property of an

author, in the exclusive use of which a copyright will protect him. * * *

"Plaintiff, adopting what was common knowledge respecting the wild horse and man's power over it, built her stories with a framework of fact, weaving in, for incidental and attractive interest, romances between men and girls. * * *

"The two pictures of the defendant Roach Studios featured the wild horse, and especially a magnificent specimen, who was the leader of the band, and carried out the common theme of the power of man over the animal. There was the incidental love story accompanying each. However, comparing the picture stories, as told by the films and their explanatory legends, I have been unable to conclude that there is substantial identity of scenes, incidents depicted, or treatment of them in whole or in substantial part.

"If it could be said in this case that the Roach Studios, using the underlying theme of plaintiff's stories, had adapted characters and incidents closely resembling those used by the plaintiff in the exposition thereof, infringement would be shown. There are a few incidents in the films which are quite strikingly similar to those which the stories describe, but they all belong to the character of natural and expected happenings, considering the normal action of animals and persons placed as the characters are in the environment in which we find them. It is not a test of infringement that such similarities exist."

The case of *Fendler v. Morosco* (1930), 253 N. Y. 281, 171 N. E. 56, was one in which the defendant had had access to plaintiff's manuscript and thereafter wrote a play entitled "The Bird of Paradise". There was some resemblance in theme and situation and much

resemblance in the details of atmosphere and local color between plaintiff's manuscript and defendant's play. The court held that there had been no violation of the plaintiff's common law copyright, saying (on page 61):

> "We have assumed that even these similarities in details are the result of suggestions derived from the play 'In Hawaii', though argument to the contrary might be made. Even if a surreptitious reading of the play 'In Hawaii' may have resulted in the introduction of some new material into 'The Bird of Paradise', where resemblance is close, the material is trivial in character and, where the material is more important in the development of the story, then, at most, plaintiff's ideas have been appropriated, but used in different form and combination. No material part of plaintiff's literary property has been appropriated. Neither in substance nor in embellishment is there any resemblance between the two plays. Details must be viewed in their setting; then resemblances vanish."

The language of Judge Manton's decision in the case of *Eichel v. Marcin,* D. C. N. Y. (1913), 241 Fed. 404, is particularly pertinent to this controversy. The court in that case said:

> "The resemblance between the two dramatic compositions, I am of the opinion, are minor instances and are not important. The copyright cannot protect the fundamental plot, which is common property, as was pointed out above, long before the story was written. It will, of course, protect the author who adds elements of literary value to the old plot; but it will not prohibit the presentation by someone else of the same old plot without the particular embellishments."

As to the separate items of similarity, it appears too clear to deserve extensive argument that no one of them could, upon any theory, be deemed a proper subject of ownership in which appellant could have acquired title. Neither a child heroine nor a child heroine who begins her career in China can be said to be a novel creation by appellant and, as to the child's precocity and ability to sing and dance, the general use of such talents in similar works has been already pointed out.

As to the escape from Chinese bandits and the aid of the old Chinese philosopher, these are natural, ancient and not novel ingredients of the Chinese atmosphere. In the case of *Fendler v. Morosco, supra,* the court said:

> "In spite of entire dissimilarity of the two plays in theme and story, there are many similarities in detail. Perhaps this is inevitable in two plays about Hawaii, which seems to suggest to Americans the hula dance and the sport of swimming; flowers and sunshine and music; it suggests, too, the dread disease of leprosy. All these things are introduced, though with varying emphasis, in both plays. Doubtless the value of the producing rights of plaintiff's play must have suffered by the successful production of any play about Hawaii. Of that she cannot be heard to complain."

So is it inevitable that in two plays dealing with China those attributes of the Chinese atmosphere that would naturally occur to the American mind, such as bandits, Chinese philosophers, philosophical sayings, river boats, plagues, droughts or famine are almost certain to recur.

Certainly the departure of the child from China on a steamer is not a novel idea and, in this connection, it

should be further noted that in appellant's play the steamer episode receives but casual mention, whereas the sequence of events on board ship in appellee's picture occupies more than sixty-five per cent of the entire narrative.

There remain, among the similarities above mentioned, first, the culmination of a romance (as to the novelty or originality of which we believe appellant will hardly attempt to lay claim); second, the fact that the bachelor meets American friends in a Chinese seaport (scarcely a development of outstanding originality or novelty in literature) and, third, the friendship of the child with all persons with whom she comes in contact (the natural and ordinary development of the character of any child star).

This court has held, in the outstanding case of *Witwer v. Harold Lloyd Corporation,* 65 Fed. (2d) 1, as follows:

> "In the case at bar, if it be assumed that there are such similarities between the story and the play as to provoke in the casual observer the consciousness that there is such a similarity between them, and that copying may be inferred therefrom, we are still confronted with the fact that mere similarity does not necessarily involve literary piracy or an infringement of a copyright. Such similarities then as exist would require further analysis to determine whether or not they are novel in the story and thus copyrightable. The copyright of a story only covers what is new and novel in it, so that the question of infringement involves a consideration of what is new and novel in the story to which the author has acquired a monopoly which has been misappropriated by another."

III.

There Has Been No Appropriation by Appellee of Any Material Portion of Appellant's Work.

Assuming for the moment that appellant has conceived novel ideas that appear in appellee's picture, a casual examination of both works conclusively demonstrates that the portions as to which similarities exist are not material in the development or treatment of the screen story. For the convenience of the court, a brief and accurate resumé of both the play and the picture have been prepared and are included in the appendix to this brief. A careful comparison of either the full text of the two works in question or of these resumés will evidence the facts that the theme, characterizations, character development, treatment, plot, incidents and all of the other material components of appellee's picture are substantially different from and clearly unlike the corresponding components of appellant's play. In other words, such similarities as exist are but minor features in the devolopment and treatment of both play and picture.

To pursue this line of reasoning further, and to its logical conclusion, it is but necessary to examine those features in which the two works are dissimilar and the extent and importance of such dissimilarities. They may, we believe, be best considered as they are set forth below:

Play	*Picture*
1. A very substantial part of the story is laid in the Chinese atmosphere with characters definitely established therein, including the arrival and early life of the	1. The Chinese atmosphere is entirely incidental and for introductory and background purposes only, the action being taken out of China before the actual

child heroine in China, the life of the missionaries, the friendship of the child heroine with a little Chinese girl, and a lengthy sequence of events in Hong Kong.	story development is commenced.
2. The story commences with a major tragedy in the life of the child heroine, consisting of the death of both of her parents.	2. There is no tragedy in the early, or any part of the picture.
3. At the outset of the story the child has been continually under loving parental care and the lack of it grieves her.	3. The child has known no parental love, and her actions are substantially affected by her acceptance of her new lot without fear for the future or regret for the past.
4. The friendship of the two children and its impending termination, as well as their later reunion are important introductory and sentimental features.	4. The child heroine has no close child friends at any time.
5. The Chinese philosopher and the father of the child heroine are close, sympathetic friends, an important feature in the development of the atmosphere of the early part of the work.	5. The Chinese philosopher and the missionary-guardian of the child are completely unsympathetic, and their relationship is briefly touched upon.
6. The two children fall into kind hands and have no problems of sustenance or support.	6. The child is robbed and becomes a helpless waif.

7. Hathaway (male lead) is a serious-minded, purposeful person, and all of his actions, which contribute materially to the story are a reflection of, and influenced by these personal traits.

8. Hathaway assumes all responsibility for the child, seriously and with a sense of responsibility.

9. The acceptance by Hathaway of the child's custody as a duty is difficult for him because of his fear of what his mother will think of the situation.

10. The authorities are delighted to have Hathaway take over the responsibility of caring for the child.

11. The two leading characters, during a material part of the action, are separated by a lovers' quarrel resulting from a misunderstanding.

7. Randall (male lead) is a wastrel and playboy, and all of his actions (until his regeneration in the final portion of the story) are a complete reflection of these characteristics.

8. Randall regards the child as an amusing plaything, takes her with him for his personal enjoyment and because the situation is a novelty and not a duty.

9. Randall, regarding the acceptance of his charge as a lark, has no qualms whatsoever about the situation.

10. The authorities trace the child's wanderings and demand her return, furnishing thereby an important reason for further developments in the story.

11. The two leading characters are never separated except for brief intervals and, except for Susan's lack of respect for Randall, their fondness for each other is never interrupted.

12. There is portrayed no portion of the action on shipboard or of the journey between China and England.

12. The greater portion (more than sixty-five per cent) of the action takes place either on shipboard or during the journey away from China, and the larger part of the incidents occurring are completely built around the shipboard and travel atmosphere.

13. A substantial part of the story is laid in a family atmosphere in an English home.

13. There is absolutely no home atmosphere introduced.

14. There is no rivalry for the hand of the heroine.

14. The rivalry for the heroine's hand is an important development of the story.

15. The love of the other characters for the child results in the reunion of a divided family, but the child has little or nothing to do with that portion of the story development which brings the two lovers together.

15. The child is the author's tool throughout in bringing and keeping together the two lovers.

16. After the departure from China, the atmosphere is entirely British.

16. After the departure from China, the atmosphere is entirely American.

17. The child's place in the Hathaway home is won by her despite various ob-

17. The child's place in Randall's life is, with one exception—the cable from

stacles, apparently planned to create suspense.	the American Consul in China—never in danger, nor are there any obstacles placed in the way of Randall's guardianship.
18. Hathaway's romance is a case of love at first sight on the part of both the man and the girl.	18. Randall's romance, though somewhat precipitous on his part, is consummated only after he has overcome the difficulties created by his reputation and mode of life.

Thus in atmosphere, characterization, character development, locale, motivating incidents—in fact, in every material component of each work under consideration, there are present such divergent methods of treatment, expression and construction that the similarities between them become entirely inconsequential. Certainly, therefore, it cannot be argued with any degree of reason that their likenesses are of the substantial materiality required by the courts to sustain a charge of piracy.

We are treating with a situation that may be well characterized by the following quotation from the opinion of the court in the case of

Frankel v. Irwin, D. C. N. Y (1918), 34 Fed. (2d) 142.

"So far as plot in this sense is concerned, there is no similarity between Frankel and Scott. There is great likeness in environment; *i. e.,* in both a person, or persons, are prevented by many difficulties from going abroad after that purpose had been announced; therefore, to save their faces they determine to remain hidden in their nominally closed houses during

the period of proposed absence. This does not tell a story or even guide one. It is hardly as much as the motif in music, of which the treatment may be grave, or gay, lively or severe, and, just as it is the treatment of the motif that makes the music, so it is the treatment of the humans put into the stated environment that makes the play; indeed, this common starting point quite as easily suggests dramatic punishment of a sordid soul as the amusing difficulty of living a lie.

"This incident or background for farce, comedy, drama, novel or homily, is common property; no one can appropriate it, nowadays at all events. The happenings in a supposedly empty house have been too often exploited for literary purposes * * *.

"When one attempts comparison of the two works in those matters as to which copyright protects—that is, the spirit or soul infusing the creatures of the author's imagination, what they desire, and how they go about achievement, the reasons for their actions and the words in which such reasons are expressed—I can see nothing but differences."

To the same effect is the view adopted in the case of

Nichols v. Universal Picture Corporation, C. C. A. 2 (1930), 45 Fed. (2d) 119.

"The only matter common to the two is a quarrel between a Jewish and an Irish father, the marriage of their children, the birth of grandchildren, and a reconciliation.

"If the defendant took so much from the plaintiff, it may well have been because her amazing success seemed to prove that this was a subject of enduring popularity. Even so, granting that the plaintiff's play was wholly original, and assuming that novelty

is not essential to a copyright, there is no monopoly in such a background. Though the plaintiff discovered the vein, she could not keep it to herself; so defined, the theme was too generalized an abstraction from what she wrote. It was only a part of her 'ideas.'

"Still, as we have already said, her copyright did not cover anything that might be drawn from her play; its content went to some extent into the public domain. We have to decide how much, and while we are as aware as any one that the line, wherever it is drawn, will seem arbitrary, that is no excuse for not drawing it; it is a question such as courts must answer in nearly all cases. Whatever may be the difficulties, *a priori,* we have no question on which side of the line this case falls. A comedy based upon conflicts between Irish and Jews, into which the marriage of their children enters, is no more susceptible of copyright than the outline of Romeo and Juliet."

In the case of

Ornstein v. Paramount Productions, Inc., D. C. N. Y. (1935), 9 Fed. Supp. 896,

a scenario submitted by plaintiff to defendant was held to be not infringed by the production "The Blonde Venus." The basic plots of each were closely parallel except in their denouement. In the scenario the wife, who had been abandoned by her husband for her infidelity which was prompted by her need for money to procure medical treatment for the husband whom she dearly loved, died, while in the motion picture the couple, estranged for identical causes, become reconciled through the intervention of their

child. It was admitted on argument the theme was in the public domain, so plaintiff's claim was "that sequential development of his plot" had been stolen. Holding for defendant, the court says:

> "It is almost inevitable that in variations in the treatment and development of the plot the principal events giving rise to similar emotions will occur with more or less like sequences; so that an author's exclusive rights are largely confined to the details, manner and method of his own particular presentation of it.
>
> "From the synopsis of the play and of the photoplay it is evident that, while both authors make use of a common fundamental plot, the stories told are not the same. There is a material difference in the characters of the principals and the episodes, although there is bound to be a resemblance in the basic narrative. The scenes, locale and action differ. The dialogue also is materially different and naturally the stories are not the same. * * *
>
> "The pleadings admit that defendants had access to complainant's play, and no proof to the contrary having been received, it seems likely that some of the ideas found in defendant's photoplay were suggested by complainant's play and other older books and plays. However, in my judgment, defendants have taken nothing from any of them that was not in the public domain or public property."

Counsel for appellant seek to show that a "material and critical portion" of appellant's play has been appropriated,

and in support of their contention dwell at great length on the ruling of the court in

Sheldon, et al. v. Metro-Goldwyn-Mayer Picture Corp., et al., C. C. A. 2 (1936), 81 Fed. (2d) 49.

In that case, the similarity between the stage play and the motion picture was so exact that, as the court said in its opinion,

> "the dramatic sequence of the scenes we have recited is the same, almost to the letter."

and

> "We cannot avoid the conviction that, if the picture was not an infringement of the play, there can be none short of taking the dialogue."

Such a description of infringement cannot in the wildest flights of fancy be applied to the instant controversy.

It is earnestly urged that appellant's play is not injured, that a comparison of her play with appellee's picture disclose such substantial differences in those material elements of each that no infringement of appellant's rights can be found.

IV.

The District Court Was Not Required to Make Findings of Fact and Conclusions of Law Upon Granting the Motion to Dismiss.

Appellant's final assignment of error takes the position that the District Court was required by Equity Rule 70½ to make special findings of fact and state its conclusions of law thereon, even though the proceeding before the District Court was determined upon a motion to dismiss her bill as amended. The cases cited by counsel do not support this contention in any degree.

Louisville & N. R. Co. v. U. S., D. C. Ill. (1934), 10 Fed. Supp. 185, was a suit in equity brought before a three-judge court to enjoin the enforcement of an order made by the Federal Coordinator of Transportation, the plaintiff urging the invalidity of the order. No testimony was taken but the cause was heard and determined upon the pleadings and certain exhibits attached to the complaint and upon an affidavit filed by the defendant. The court made and filed detailed findings of fact and conclusions of law, as it was indeed required to do. It was necessary for the court to determine questions of fact before coming to its decision that the order in question was valid, and in holding that the provisions of the Equity Rule were imperative in such cases the court was plainly correct, for the rule specifically requires the making of findings in all cases in equity heard before three judges.

Parker v. St. Sure, C. C. A. 9 (1931), 53 Fed. (2d) 706, was a proceeding in mandamus to require the trial court to make more extensive findings, petitioner objecting to those prepared, served and filed by the successful litigant, under the direction of the District Judge. The appellate court simply held that the degree of detail necessary in findings was committed to the discretion of the District Judge, and accordingly declined to issue the writ. Here, again, there had been a full trial upon controverted questions of fact.

We do not believe that appellant can seriously urge this claim of error. A motion to dismiss raises questions of law only, and in granting such a motion the court merely determined that the bill as amended did not state a cause of action. There were no questions of fact raised and there were none to be found.

As the court says in *Ornstein v. Paramount Productions, Inc.,* D. C. N. Y. (1935), 9 Fed. Supp. 896, whch was a copyright case, determined upon a motion to dismiss:

> "If it appears from the examination of the play and the photoplay that the photoplay does not infringe, there is no reason for having a trial or passing upon the other issues."

Conclusion.

We have shown, we believe, conclusively that there has been no appropriation by appellee of any material portion of appellant's play in which she has any rights of common law copyright.

We have also demonstrated that the methods of treatment of the few similarities that may be found in broad outline in the two works is in each case so divergent as to completely repel the charge of piracy.

We therefore respectfully urge that the decree of the District Court be affirmed.

Dated at Los Angeles, California, this 20th day of July, 1938.

Respectfully submitted,

ALFRED WRIGHT and
GORDON HALL, JR.,
Solicitors for Appellee.

APPENDIX.

Outline of the Play "Dancing Destiny".

In the interior of China, Arthur Walton, an American missionary, is joined by his wife and their little girl, Désirée, or Destiny, as she comes to be called. Walton's wife, a dancing-teacher, has taught little Destiny to dance. As a minister, Walton disapproves of this and forbids Destiny to perform in public, but she continues to dance for her family and friends.

Walton has a good friend in Li Ling Chu, a wealthy Chinese, whose little daughter, Fair Blossom, is about Destiny's age. The two children become playmates and Destiny "begins to pick up some Chinese words."

Li Lung Chu is going to Hongkong, where his daughter is to sail for England to be educated and he invites the Waltons, including Destiny, to accompany him on this trip to the coast. On their way to take the river boat, the entire party is captured by bandits. Realizing they are facing death, Li Ling Chu, giving gold and the boat tickets to Destiny and Fair Blossom, tells the children to creep to the river bank and hide in the rushes until the boat comes. Shortly afterward, as the boat appears, Li Ling Chu and the Waltons are killed by the bandits.

In the excitement, Destiny and Fair Blossom get on the boat, where they hide, but come out as soon as it gets under way. There is no question of the children being stowaways, as they have tickets, but Destiny refuses to give them up to anyone excepting their parents. At

this point, one of the passengers, Winston Hathaway, a young Englishman, befriends the children and tells them of their parents' death.

An agent of Li Ling Chu assumes charge of Fair Blossom and Hathaway takes Destiny to the American Consul in Hongkong. The latter says it may take months to trace Destiny's relatives in America and Hathaway, having become attached to the little girl, finally decides to take her to his home in England and send her on to her American relatives when they are found.

In Hongkong, Hathaway comes across a friend, Peter Norman and, through him, meets an English girl, Ruth Stevens, who is stranded, as she did not get the job she came to China to take. Becoming interested in Ruth, Hathaway insists that she accept a loan that will enable her to return to England. Destiny also meets Ruth and takes a great fancy to her.

When Hathaway's friend, Peter Norman, checks out of the hotel, Ruth is given his room. Not knowing that Norman has vacated the room and seeing Ruth coming out of it, Hathaway believes she is having an affair with his friend and is even more sure of this on learning they sailed for England on the same boat. Although Ruth is really a fine, virtuous girl, Hathaway, now believing otherwise, resolves to put her out of his life.

Hathaway and Destiny are next seen as Hathaway arrives at his home in England with the child.

Reaching England without funds, Ruth endeavors, on her arrival, to sell a stamp collection left her by her father

and takes it to a collector, who turns out to be Hathaway's father. Mr. Hathaway is a testy, explosive old gentleman, who has so quarreled with his rather caustic wife that they live in separate parts of the house and rarely speak to each other. Taking a liking to Ruth and learning she can play chess, Mr. Hathaway has her come to live in the house as his secretary. As yet, Ruth does not know she is in the home of young Hathaway, who won her gratitude by helping her in Hongkong.

And now Hathaway arrives with Destiny. The child is somewhat begrudgingly taken in, but soon wins the affections of both Mr. and Mrs. Hathaway, as well as the servants, including the dignified butler, Hawkins.

Surprised to find Ruth in his home, Hathaway, always believing she had been the mistress of his friend, Norman, treats the girl with frigid politeness.

The way in which Mr. and Mrs. Hathaway try to monopolize little Destiny results in heated arguments between them, but the tenderness they both show the child stirs memories of the happy days when their own children were young and is gradually melting away the barrier that has grown up between them.

And now, when young Hathaway's friend, Norman, comes to see him and explains that Ruth, who means nothing to him, took his room *after* he left the hotel, Hathaway realizes how he misjudged the girl and resolves to make amends for his unjust suspicions at the first opportunity.

One day, when Fair Blossom, the little Chinese girl who is being educated in England, has come to spend the day with Destiny, the house is thrown into a panic by the news that Miss Abigail Walton, Destiny's American aunt, is coming to take the child away with her.

When Mrs. Hathaway sees the elderly Miss Walton, her heart sinks at the thought of turning over her happy little charge to the spirit-breaking discipline of this severe, narrow-minded spinster. Miss Walton curtly refuses to leave Destiny with the Hathaways, saying she has a duty to do by her nephew's child and she is going to do it.

And then Mrs. Hathaway, who has a sudden inspiration, goes and gets little Fair Blossom, instead of Destiny, and takes her to Miss Walton without saying a word. Jumping at the conclusion that this is her nephew's child, Miss Walton gives a gasp of horror as she thinks of what her neighbors in New England will say if she brings back a "heathen Chinese" as a Walton, and an illegitimate one at that. She can't face this disgrace, and, telling Mrs. Hathaway she can have the child and welcome, Miss Abigail Walton rushes out of the house as though afraid of being contaminated.

Learning from his friend that he has misjudged Ruth, Hathaway begs her forgiveness and she happily consents to become his wife. Hathaway's parents plan to bring up Destiny, who, because of their mutual love for her, is the passive instrument in bringing about a better understanding between them. And so both orphans, Ruth and little Destiny, are to remain in the Hathaway family.

Outline of the Picture "Stowaway".

Orphaned when her missionary parents were killed by bandits, little Barbara Stewart, at the opening of the picture, is living with Mr. and Mrs. Kruikshank, also missionaries, in a Chinese village. A bright, versatile child, Barbara speaks Chinese fluently, exchanging quaint sayings in that language with her good friend, Sun Lo, the village magistrate.

When told the bandits are again approaching the village, Kruikshank refuses to leave but Sun Lo, to save Barbara, virtually kidnaps the child and, planning to send her to his brother in Shanghai, entrusts her to a coolie to take to that city in a junk. On arriving at Shanghai, the coolie starts gambling and Barbara is left to fend for herself. Wandering about the streets with her dog, she sees Tommy Randall, rich American playboy, trying in vain to make a shopkeeper understand him and acts as interpreter. Becoming interested in the little girl, Tommy, after hearing her story, decides to help her and takes her along with him in his car.

Stopping to pick up some gay friends he had promised to take to the boat on which he is also sailing, Uncle Tommy, as Barbara calls him, is gone so long that she gets into the rumble seat, which she closes, and falls asleep. Seeing no sign of Barbara and thinking she has left him, the somewhat inebriated Tommy drives to the boat and the car is lowered into the hold.

After a time, Barbara wakes up and, raising the cover of the rumble seat, where she has been curled up, makes

her way to a stateroom occupied by an American girl, Susan Parker, and her companion, Mrs. Hope. Susan is engaged to Mrs. Hope's son, Richard, a fussy, egotistical young man, and is going to marry him when the boat reaches Bangkok, where he is employed by an exporting firm.

Although Mrs. Hope disapproves, Susan looks after Barbara and when the child explains how she found herself on board after falling asleep in Uncle Tommy's car, it is believed she is the playboy's niece. Susan and the Captain take Barbara to Tommy's cabin and, after being awakened with some difficulty by his valet, Atkins, an amusing character, he warmly welcomes the little girl and says he will pay her passage.

On finding that Barbara is the ward of the Kruikshanks, the missionaries she lived with, the Captain cables the American Consul to get in touch with them. Barbara, as personified by Shirley Temple, is so winning that she captures the affection of everyone (with the exception of the disagreeable Mrs. Hope), and Atkins, cuts up all sorts of antics to amuse her. When the little girl is tucked into bed, Tommy tells Atkins to sing her a lullaby, but the valet's attempt is such a dismal failure that Barbara sings the lullaby, with both Tommy and Atkins falling asleep.

Thus brought together by Barbara, Tommy and Susan show such a mutual interest that Mrs. Hope becomes worried and cables her son, Richard, to meet the boat at Hongkong, instead of waiting for Barbara at Bangkok.

At Hongkonk, Tommy, Susan, and Barbara go into a Chinese theatre where an amateur show is being conducted and, going up on the stage, Barbara delights the audience by her singing and dancing.

On coming out of the theatre, Tommy is carrying Susan across a muddy street in his arms when they encounter Mrs. Hope and her son, Richard, who has just arrived in response to his mother's cable. They take Susan back to the boat with them and later Tommy, perturbed by this encounter, leads off a Chinese child by the hand thinking it is Barbara, who is engaged in petting a dog.

Pursued by the mother of the Chinese child, Tommy is arrested for kidnaping and Barbara goes along to jail with him.

The Captain of the boat gets them out and, on returning to the dock, Tommy encounters his gay friends, with whom we saw him in Shanghai. One of them, known as the Colonel, is quite drunk and Tommy helps him up the gangplank. Susan sees this and, getting the idea that Tommy is drunk also, is more inclined to favor Richard.

And now the Captain receives a cable saying Barbara's guardians, the Kruikshanks, were killed by the bandits. The cable instructs the Captain to turn Barbara over to the American Consul at Singapore, who is to send the child back to Shanghai where she will be placed in a missionary home for girls.

Greatly upset by this news, Tommy asks the Captain if he can't save Barbara from the home by adopting her. When the Captain replies that no court would let Tommy have Barbara because he is a bachelor, he goes to Susan and begs her to adopt the little girl, saying she will meet the requirements as she is to be married soon. And she won't have to keep the child long as he will get married himself to some girl or other as soon as he reaches the States and then come back and take Barbara off her hands.

Realizing that Tommy has plenty of good qualities, even though he has been rather wild, and is greatly attached to Barbara, Susan agrees to this plan. But, when she tells Richard and his mother she is going to adopt Barbara, they make such a row that, revolted by their selfishness, she breaks her engagement.

With Susan's marriage called off, it looks as though Barbara can't escape being sent to an institution. But Tommy, to whom Barbara's happiness has come to mean so much, now asks Susan to marry him. If they do this, they can adopt the little girl and it will be a marriage in name only. As soon as the ship reaches San Francisco, Susan can go straight to Reno and get a divorce and she will be free again in a few weeks.

For Barbara's sake, Susan consents to this and she and Tommy are duly married by the Captain of the ship.

Some time later, we find Susan in Reno, about to get her divorce from Tommy. Richard is also in Reno

and has persuaded Susan to promise to marry him as soon as she gets her freedom.

Just before the case is called, Tommy and Barbara arrive. As Susan, because of her promise to Richard, is refusing Tommy's plea that she give up the divorce, Barbara makes friends with the kindly, understanding judge and goes into his chambers with him. The judge, having seen that Tommy and Susan love each other, enters into a little conspiracy with Barbara.

When the case is called and is uncontested, the judge springs a surprise by calling Barbara to the witness-stand. Richard, sensing defeat, jumps up and objects, but is promptly squelched by the judge.

Then Barbara, in the big legal words the judge has taught her, goes on to deny the things alleged in the complaint, such as incompatibility of temperament, and states that, in her opinion, the marital status of the contestants should be left undisturbed. The judge, saying that is his opinion too, denies the divorce and tells Susan and Tommy to take Barbara and go home where they belong. Susan and Tommy decide to follow this welcome advice and everyone is happy excepting Richard. And Barbara, after expressing her delight in a song, is folded in the loving embrace of Tommy and Susan.

No. 8847

United States Circuit Court of Appeals

For the Ninth Circuit

JOAN STORM DEZENDORF,
Appellant,

vs.

TWENTIETH CENTURY-FOX FILM CORPORATION, a corporation,
Appellee.

REPLY BRIEF FOR APPELLANT

JAS. M. NAYLOR,
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Subject Index

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No. 8847

United States Circuit Court of Appeals

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JOAN STORM DEZENDORF,
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Appellee.

REPLY BRIEF FOR APPELLANT

QUESTION OF ORIGINALITY NOT BEFORE THE COURT

It was unequivocally argued in appellant's opening brief (pp. 9 and 10) that the originality of her play was admitted by the appellee in the filing of its motion to dismiss. The appellee contends (brief pp. 5-7) that this is not true but on the contrary:

> "The question of originality, in the sense of novelty of treatment, entitling the author to the protection of the common law or of the copyright statute is just as definitely before the court for determination as is the question of infringement."

The appellee takes the position that while the motion to dismiss admits the truth of the facts well pleaded in the

complaint (except those facts or allegations which are superseded by the amendment incorporating the two works into the bill), originality is not one of the facts in the class admitted.

The disingeniousness of this line of reasoning is believed quite apparent when consideration is given the fact that appellee treats the allegations as to appellant's authorship and ownership of the play and appellee's access thereto as having been admitted for the purposes of the motion (appellee's brief pp. 3-5). There is no valid distinction between allegations as to authorship, originality, ownership and access in so far as the effect of a motion to dismiss is concerned.

The question of originality in a copyright suit is one of fact and it is a material fact. It can only be properly tested by comparison with prior works properly pleaded and proved, subject to cross-examination, as distinguished from counsels' vague reference in appellee's brief to what is or is not in that vast and nebulous field known as the public domain. Being a fact well pleaded in the bill of complaint originality must be deemed admitted by the motion to dismiss. See

Stromberg Motor Devices Co. v. Holley Bros. Co., 260 Fed. Rep. 220, 221:

> **"It is elementary that on such a motion the allegation of material facts which are well pleaded in the bill must be accepted as true for the purposes of the motion, and that only defenses in point of law arising upon the face of the bill may be raised in this manner.**
>
> (Citing Tompkins v. International Paper Co., 183 Fed. Rep. 773, 106 CCA 529; Krouse v. Brevard Tan-

ning Co., 249 Fed. Rep. 538, 161 CCA 464; Edwards v. Bodkin, 249 Fed. Rep. 562, 161 (CCA 488))." (Emphasis supplied.)

Caesar v. Joseph Pernick Co., Inc., 1 Fed. Sup. p. 290 (cited at page 10 of appellant's opening brief) involved a motion to dismiss the bill of complaint and for an order and decree to such effect on the ground that neither of the claims of the patent referred to in the bill of complaint was infringed by either of the devices illustrated as Exhibits A and B of the defendant's interrogatories. The court had this to say (p. 291):

> **"By this motion under Rule 29 of the Equity Rules (28 USCA §723), which is the substitute for the old demurrer, the defendant admits, for the purposes of this motion, the validity of the patent in suit, and the only question is infringement."** (Emphasis supplied.)

I. T. S. Rubber Co. v. Essex Rubber Co., 281 Fed. 5 (C. C. A. 1).

In considering the defendant's motion to dismiss a bill of complaint for patent infringement, the court said (p. 6):

> "For the purpose of determining the question raised by the motion, **the defendant concedes that the patent is valid, and that there is nothing in the prior art, except as stated in the patent itself, and nothing in the file wrapper which should limit the plain terms of the patent."** (Emphasis supplied.)

Bronk v. Chas. H. Scott Co., 211 Fed. 338 (C. C. A. 7):

> "If the decree cannot be sustained by an application of the law to the fact admitted by appellant in

her bill and in her answers to appellee's interrogatories, the cause must be remanded for trial in due course. **Undoubtedly the purpose of authorizing interrogatories was to enable the court to make a summary disposition of a cause by applying the law to an admitted state of facts; but when the facts are not admitted neither that rule nor any other warrants a summary disposition on affidavits or other untested showings by the party moving for the summary disposition, in lieu of proofs duly taken with proper opportunity for the adversary to cross-examine.** We therefore disregard the file-wrapper and the patents tendered by appellee, and consider only those facts which stood admitted by appellant upon the record prior to appellee's motion for a decree of dismissal.

* * * * * * *

"If a bill in and by its own averments, states a prima facie case, that case cannot properly be overthrown by the chancellor merely on the ground that he judicially knows of facts that would support an answer. His judicial knowledge must go farther and be so broad and all-embracing that he can properly hold that no facts exist that would tend to controvert the supposed answer and support a replication and the bill. **This is so because, if such facts exist, the complainant is entitled to a hearing where he can present and argue the facts, and such a hearing cannot be had on a demurrer to the bill.**" (Emphasis supplied.)

Clearly, the motion to dismiss in the present case raised only the specific question of infringement, a fact to be determined from the face of the amended bill of complaint, with play and picture annexed, by known rules of law.

It is significant to note that appellee offers no reply to appellant's argument (appellant's opening brief, pp. 9-10) that a motion to dismiss in a copyright suit admits originality like a similar motion admits validity of a patent (citing *Caesar v. Jos. Pernick Co. Inc.*, supra). No one would have the temerity to discuss prior art and its relation to the patent in suit where only the issue of infringement was raised by a motion to dismiss and no valid distinction is seen between the two types of cases. If the appellee desired to test the fact of originality there was an available procedure, i. e., let the case go to trial and offer proper proof of prior third party works.

We do not understand any of the authorities cited in appellee's brief on the question of originality as going so far as to permit counsel or the court to rely on untested showings or vague references to prior works.

REFERENCES TO ORIGINALITY OR NOVELTY OF APPELLANT'S PLAY IN APPELLEE'S BRIEF SHOULD BE IGNORED AND STRICKEN.

It having been demonstrated that originality of appellant's play has been admitted, there is no room in the argument of the present case for appellee's vague and unsupported references to alleged "prior art" or material in the public domain.

The principal question presented for determination on this appeal is whether the appellee's motion picture infringes appellant's play. While it is appreciated that an appeal in this court is regarded as a proceeding *de novo,*

it must be remembered that the only record before the court consists of a bill of complaint, amended by annexation of appellant's play and appellee's picture, and a motion to dismiss, and therefore there is no evidence properly before the court concerning the question of originality in any of its phases.

Appellee cannot escape the logical effect of the analogy drawn between the case at bar and a suit for patent infringement wherein the naked issue of infringement is raised by a motion to dismiss the bill of complaint. There would be a decided lack of reason if the defendant in the patent case, before the court on motion to dismiss, could question validity, anticipation or the like by vague reference in its brief to prior public uses and prior patents or in other words make an informal reference to prior art which had not been subject to proof or cross-examination. It is obvious that a court would and should not countenance such procedure. No valid distinction can be seen between that situation and the present so far as appellee may seek to question the originality of appellant's play. The law and the rules of court have provided a definite and orderly procedure for raising the defense of lack of originality of copyright or invalidity of a patent. It is based upon pleading and proof. Any other system would lead to pandemonium. Neither court nor counsel would know where to begin nor what the ending would be.

We submit therefore that any and all reference in the appellee's brief to lack of originality or novelty should consequently be ignored and stricken to the end that the issue of infringement may not be rendered obscure.

APPELLEE ADMITS INFRINGEMENT OF SUBSTANTIAL PORTIONS OF APPELLANT'S PLAY.

While we dispute its completeness, for the reasons set forth in our opening brief, it is submitted that the list of similarities between appellee's brief (pp. 8-9) constitute an admission of infringement. Where authorship, originality, ownership and access are admitted, as they were for the purpose of the appellee's motion to dismiss, it is clear that the appellee's own outline shows that it went too far in copying matter from appellant's play as to series of events, episodes, technique, dramatic situations, dramatic plot, treatment, embellishment and detail. It is not enough for the appellee to contend that this or that portion of its picture was borrowed from antiquity or a similar nebulous source since the question of originality is not before the court.

In support of her contention that the record shows that the appellee in making its picture infringed her play, appellant relies upon and again refers to the decision in *Sheldon, et al. v. Metro-Goldwyn Pictures Corporation, et al.,* 81 Fed.(2d) 49 (C. C. A. 2) (cited at p. 16 of appellant's opening brief).

CONCLUSION

We have shown that the only question before the court in this appeal is whether the appellee's picture infringes appellant's play. The questions of authorship, originality, ownership and access are deemed admitted for the purpose of the appellee's motion to dismiss. It is equally clear that appellee copied portions of appellant's play and produced a picture which infringed appellant's common law copyright.

Reversal of the judgment of the District Court is believed in order and accordingly prayed.

Dated: July 30, 1938.

San Francisco, California.

Respectfully submitted,

Jas. M. Naylor,
I. Henry Harris, Jr.,
Calvin L. Helgoe,
Attorneys for Appellant.

No. 8880

United States

Circuit Court of Appeals

For the Ninth Circuit.

MELVIN WHITEHEAD and FERN PECK, by her guardian ad litem, Ellen Barnard,

Appellants,

vs.

REPUBLIC GEAR COMPANY, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 8880

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL

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Seattle, Washington,
Attorneys for Appellants.

BOGLE, BOGLE & GATES,
603-624 Central Bldg.,
Seattle, Washington,
Attorneys for Appellee. [1*]

In the Superior Court of the State of Washington
for the County of Skagit
No. 15524

Dist. Court No. 21161

FERN PECK, a minor by her guardian ad litem, Ellen Bernard,
Plaintiffs,

vs.

MORRISON MILL CO., a corporation, REPUBLIC GEAR COMPANY, a corporation, and FRANK DAY,
Defendants.

PETITION FOR APPOINTMENT OF GUARDIAN AD LITEM

Comes now Ellen Barnard, and petitions the Court for an order appointing her as guardian ad

*Page numbering appearing at the foot of page of original certified Transcript of Record.

litem of Fern Peck, a minor, and shows to the Court as follows:

I.

That Fern Peck is an infant of the age of twenty years, being born on the 6th day of December, 1916, and resides with her mother Ellen Barnard in Mount Vernon, Washington. That the said Fern Peck has no general or testamentary guardian.

II.

That said Fern Peck has a cause of action against the defendant Morrison Mill Co., and the Republic Gear Company and Frank Day, as follows:

That on the 25th day of *Ju*anuary, 1937, at about twelve o'clock P. M., while riding as a passenger in the automobile of Melvin Whitehead, they had a collision with a Kenworth Truck, owned by the Morrision Mill Co., a corporation and operated at the time of the collision by Frank Day, its agent and employee.

III.

That said minor has not been paid any sum whatsoever for settlement, as the result of said injuries and damages sustained and the said injuries consist of cuts from her hair line in the middle of her forehead, down to the bridge of her nose, one cut across the nose from cheek to cheek, one cut on the upper lip under the right nostril and a cut on the lower lip and chin, also a cut on the right side of her head, injuries to both knees and to her back. [2]

IV.

That Ellen Barnard, the mother of said minor, is a competent and proper person to become guardian ad litem of said minor Fern Peck, for the purpose of prosecuting a cause of action against the defendants Morrison Mill Co., Republic Gear Company and Frank Day, for the collision or damages so sustained by said minor.

Wherefore your petitioner prays that she be appointed guardian ad litem for Fern Peck, a minor, to prosecute said action on her behalf.

WARREN J. GILBERT
Attorney for Plaintiffs

[Endorsed]: Skagit County, Wash. Filed Apr. 23, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy.

State of Washington,
County of Skagit—ss.

Ellen Barnard, being first duly sworn upon oath, deposes and says: That she is the petitioner above named, that she has read the foregoing petition and that the contents thereof and that all the matters and things therein alleged are true.

ELLEN BARNARD

Subscribed and sworn to before me this 23rd day of April, 1937.

WARREN J. GILBERT
Notary Public in and for the State of Washington, residing at Mount Vernon. [3]

[Title of Court and Cause Skagit County.]

ORDER APPOINTING GUARDIAN AD LITEM

This matter comes on for hearing, on this 23rd day of April, 1937, upon the petition of Ellen Barnard, mother of Fern Peck, a minor, for an order appointing her guardian ad litem of said Fern Peck, Petitioner appearing in person and orally requesting the appointment of her said mother as herein ordered and from the pleadings, files and evidence the court finds:

I.

That Fern Peck is an infant of the age of twenty years, being born on the 6th day of December, 1916, and resides with her mother Ellen Barnard in Mount Vernon, Washington. That the said Fern Peck has no general or testamentary guardian.

II.

That the said Fern Peck has a cause of action against the defendant Morrision Mill Co., and the Republic Gear Company and Frank Day, as follows:

That on the 26th day of January, 1937, at about twelve o'clock P. M., while riding as a passenger in the automobile of Melvin Whitehead, they had a collision with a Kenworth truck, owned by the Morrison Mill Co., a corporation and operated at the time of the collision by Frank Day, its agent and employee.

III.

That said minor has not been paid any sum what-

soever for settlement, as the result of said injuries and damages sustained and the said injuries consist of cuts from her hair line in the middle of her forehead, down to the bridge of her nose, one cut across the nose from cheek to [4] cheek, one cut on the upper lip under the right nostril and a cut on the lower lip and chin, also a cut on the right side of her head. Injuries to both knees and to her back.

IV.

That Ellen Barnard, the mother of said minor, is a competent and proper person to become guardian ad litem of said minor Fern Peck, for the purpose of prosecuting a cause of action against the defendants Morrison Mill Co., Republic Gear Company and Frank Day, for the collision or damages so sustained by said minor.

It is therefore hereby ordered that Ellen Barnard be, and she hereby is appointed guardian ad litem of Fern Peck, a minor, for the purpose of prosecuting the said action against the defendants Morrision Mill Co., a corporation, Republic Gear Company, a corporation and Frank Day, hereinabove referred to.

Done in open Court this 23rd day of April, 1937.

W. L. BRICKEY

Judge

[Endorsed]: Skagit County, Wash. Filed Apr. 23, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy. [5]

[Title of Court and Cause Skagit County.]

SUMMONS

The State of Washington, to the said Morrison Mill Co., a corporation; Republic Gear Company, a corporation and Frank Day, above named Defendants:

You and each of you are hereby summoned to appear, within twenty (20) days after the service of this Summons, exclusive of the day of service, if service is made upon you within the State of Washington, or within sixty (60) days after the service of this Summons, exclusive of the day of service, if service is made upon you without the State of Washington, and defend the above entitled action in the above entitled court and answer the complaint of plaintiff herein, and serve a copy of your Answer upon the undersigned attorney for plaintiff, at his office hereinbelow stated; and in case of your failure so to do, judgment will be entered against you according to the demands of the complaint which has been filed with the Clerk of the above entitled Court, a copy of which is herewith served upon you.

.....

Attorneys for Plaintiffs

Office and Post Office Address:

Matheson Building,

Mount Vernon, Washington.

[Endorsed]: Skagit County, Wash. Filed Apr. 26, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy. [6]

[Title of Court and Cause Skagit County.]

COMPLAINT

Come now the plaintiffs, for their causes of action against the defendants, allege as follows:

I.

Melvin Whitehead, for his first cause of action against the defendant alleges: That the Morrison Mill Co., is a corporation, duly organized and existing under and by virtue of the laws of the State of Washington, doing business in Skagit County, State of Washington, and that at all times herein mentioned, was the owner of a Kenworth truck, registration number 20563.

II.

That at all the times hereinafter mentioned, the defendant Republic Gear Company, was and now is a corporation, duly organized and existing with its principal office at Detroit, Michigan, but with an office for the transaction of business in the City of Seattle, King County, Washington, and that said defendant during all the times hereinafter mentioned was and still is, doing business within the State of Washington.

III.

That Melvin Whitehead, at all times herein mentioned was the owner of one Dodge coupe, 1936 model, engine number D2-135527 and serial number 4026463.

IV.

That at all times hereinafter referred to, the defendant Republic Gear Company was and now is engaged in the manufacturing, distributing and sale of axles for use in trucks, and at some time prior to November [7] 12, 1936, had sold to the Lewis Motor Company of Bellingham, for the purpose of resale to the public, an axle which appeared to be, and if it had not been for the defects hereinafter set forth, would have been, a suitable, safe and proper axle to be installed in the truck of the defendant Morrison Mill Company as hereinafter described, and on or about the 12th day of November, 1936, the defendant Morrison Mill Co., purchased the said axle from the said Lewis Motor Company and installed the same in a said Kenworth two ton truck, registration number 20463, then owned by the defendant Morrison Mill Co.

V.

That the said Republic Gear Company during all the times prior to the said purchase and subsequent thereto advertised and represented to the public that the said axle was of chrome steel, and was a suitable, safe and proper axle to be installed and used in such trucks as the said truck of the defendant Morrison Mill Co., and there was nothing about the *the* said ax*el* which was or would be apparent to a purchaser in the exercise of ordinary care to indicate to such purchaser, or give to such purchaser, any notice of the defects hereinafter set forth.

VI.

That as a proximate result of the negligence of the defendant Republic Gear Company in its manufacture and inspection the said axle was defective in the following particulars, to-wit: It was constructed of defective material, in its construction it had been treated with improper heat treatment, it had been shaped with improper fillets, and, in consideration of the other defects hereinabove specified, it was of inadequate shape and size.

VII.

That the said defendant Morrison Mill Co., after purchasing the said axle installed the same upon its said truck, and in the course of the use of the said truck between the said date of purchase and the time of the accident hereinafter set forth, and as a result of each and all [8] of the defects hereinabove set forth, a defect known to metallurgists as a "fatigue fracture" developed in the said axle.

VIII.

That about midnight of the 26th day of January, 1937, while the said truck of the defendant Morrison Mill Co., was being operated upon the Pacific Highway upon the bridge whereby the said Pacific Highway crosses the Skagit River in Skagit County, Washington, and as a proximate result of the defects in said axle as hereinbefore set forth, the said axle broke, and the said truck thereby became disabled upon the said Pacific Highway, and unable to move under its own power.

IX.

That said truck heavily loaded with boxes was stopped on the west half of said paved highway, directly in the lane of travel, on said highway, for traffic proceeding in a southerly direction. That said truck was parked without a tail light or any lights in the rear whatsoever. That said truck could have been coasted off of the paved portion of said highway before it came to a stop and after said axle broke. That said truck was left without any light guard, signal or watchman by the driver and employee of the Morrison Mill Co., and during his absence, and while said truck was so standing in its disabled condition and as the proximate result of said defects and said axle and the negligence of the said defendant Republic Gear Company as hereinbefore set forth; and as the proximate result of the negligence of the defendant Mirrosion Mill Co., and its agent and employee Frank Day, in leaving said truck parked on said highway without any tail lights, running lights, or end lights and without a person to direct traffic, and as the proximate result of the negligence of said defendants in not driving said truck off of the main portion of said highway, the car which was being operated by the plaintiff Melvin Whitehead in a prudent and careful manner, came into violent collision with said truck, causing the damages hereinafter alleged.

X.

That as the result of the negligence of the said

defendants, this plaintiff suffered severe personal injury, consisting of a blow to the [9] top of his head, cuts on his forehead and a severe blow to his chest, which caused him and still continues to cause him great pain and suffering, on account of which he was unable to work for a period of sixty days. That he was capable of earning $100.00 per month as a truck driver during said time and was regularly employed at the time of said accident. That he has been required to pay medical expenses and doctors bills in the sum of $100.00, all to his damage in the sum of $2000.00.

For a second cause of action, the plaintiff complains of the defendants and further alleges:

I.

That he repeats all of the allegations contained in paragraphs I to IX both inclusive, of his first cause of action and makes the same a part hereof, by this reference.

II.

That as a proximate result of the defendants' aforesaid negligence, as hereinabove alleged, the 1936 Dodge Coupe, serial number 4026463 and engine number D2-135527 owned by the plaintiff was completely demolished to his damage in the sum of $775.00.

And for a third cause of action against the defendants, Fern Peck, by her guardian ad litem alleges:

I.

That Ellen Barnard has been appointed guardian ad litem for the plaintiff, Fern Peck and authorized to bring this action.

II.

That the plaintiff realleges and makes a part of this cause of action, paragraphs I, II, III, IV, V, VI, VII, VIII and IX, of the cause of action of Melvin Whitehead and by reference, makes all of said allegations a part of this cause of action.

III.

That as the result of the negligence of the said defendants, this plaintiff received several lacerations on her face, extending from the line of her hair in the middle of her forehead, down to a point between the two eyebrows; a cut across her nose from one cheek to the other, cutting into the bridge of the nose, severing of upper lip below [10] the right nostril, a cut on the right side of her chin, a cut on the lower lip and a cut on the right side of her head. That it was necessary to use twenty-seven sutures in order to bind said lacerations and that as a result thereof, the plaintiff has permanent scars left on her face which change the contour of her face and mouth and cause her great embarrassment and mental anguish. That said scars have permanently disfigures and changed the contour and expression of her face. That the plaintiff was an attractive girl before said accident, but now she has been made unattractive by reason of said per-

manent scars. That the plaintiff received a severe blow to her back and both knees were injured all said injuries causing her severe pain and discomfort. That the plaintiff was an ablebodied person, capable of earning $90.00 per month at the time of said accident and was employed at the wage of $60.00 per month and board, at the time of said accident; and she was prevented by reason of said injuries from performing said duties for a period of two months, all to her damage in the sum of $7,500.00. That it was necessary for the plaintiff to employ medical assistance and hospital aid, all for the reasonable sum of $250.00, which it will be necessary for her to pay.

Wherefore, plaintiffs pray for judgment against the defendants, in the following sums, to-wit:

On their first cause of action, the sum of $2,100.00.

On their second cause of action the sum of $775.00.

On their third cause of action, the sum of $7,750.00, and for such other and further relief as the pleadings, files and evidence will warrant.

WARREN J. GILBERT

Attorney for Plaintiffs [11]

State of Washington,
County of Skagit—ss.

Ellen Barnard, being first duly sworn upon oath deposes and says: That she is the guardian ad litem for the plaintiff Fern Peck, named in the above entitled action. That she makes this verification as such guardian ad litem, that she has read the

above and foregoing complaint, knows the contents thereof and that the allegations contained therein are true, as she verily believes.

ELLEN BARNARD

Subscribed and sworn to before me this 22nd day of April, 1937.

WARREN J. GILBERT

Notary Public in and for the State of Washington, residing at Mount Vernon.

[Endorsed]: Skagit County, Wash. Filed Apr. 26, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy. [12]

[Title of Court and Cause Skagit County.]

AFFIDAVIT OF SERVICE OF SUMMONS AND COMPLAINT ON REPUBLIC GEAR COMPANY, A CORPORATION

The State of Washington,
County of King—ss.

C. G. Tackaberry, being first duly sworn, on oath deposes and says:

That he now is, and at all times herein mentioned was, a citizen of the United States and of the State of Washington, over the age of twenty-one years, competent to be a witness in the above entitled action, and not a party thereto.

That on the 23rd day of April, 1937, he served the Summons and Complaint in the above entitled ac-

tion on the defendant, Republic Gear Company, a corporation, by delivering to and leaving with T. F. Barsby, Residential Statutory Agent of said Republic Gear Company in the State of Washington, personally, at 1722 Broadway Ave., Seattle, in King County, Washington, a copy of said summons and therewith a copy of said Complaint for the said Republic Gear Company, a corporation.

C. G. TACKABERRY

Subscribed and sworn to before me this 23rd day of April, 1937.

BURTON J. WHEELON

Notary Public in and for the State of Washington, residing at Seattle.

[Notarial seal of Burton J. Wheelon
Commission expires Sept. 17, 1940]

[Endorsed]: Skagit County, Wash. Filed Apr. 26, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy. [13]

[Title of Court and Cause Skagit County.]

DEMURRER

Comes now Republic Gear Company, one of the defendants above named, and demurs to plaintiff's complaint herein and each cause of action therein upon the ground and for the reason that the same

fails to state facts sufficient to constitute a cause of action against this defendant.

BOGLE, BOGLE & GATES
Attorneys for Defendant
Republic Gear Company

[Endorsed]: Skagit County, Wash. Filed May 11, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy. [14]

[Title of Court and Cause Skagit County.]

NOTICE OF ISSUE OF LAW AND NOTE FOR MOTION CALENDAR

Nature of this action; Demurrer.

To the Clerk of the above entitled Court: Please note above Demurrer for argument on the motion calendar for Monday May 24th, 1937.

WARREN J. GILBERT
Attorney for Plaintiffs

To Bogle, Bogle & Gates, Attorneys for Defendant Republic Gear Co.: Please take notice that the above entitled issue will be brought on for argument, before the Court on Monday, the 24th of May, 1937.

.....
Attorney for Plaintiffs

We acknowledge receipt of a true copy of the within notice and accept service thereof.

BOGLE, BOGLE & GATES
Attorneys for Republic Gear Co.

[Endorsed]: Skagit County, Wash. Filed Jun. 1, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy. [15]

[Title of Court and Cause Skagit County.]

PETITION FOR REMOVAL

The petition of the defendant Republic Gear Company, a Michigan corporation, respectfully shows:

I.

That on or about the 26th day of April, 1937, the above entitled action, which is an action of a civil nature, was brought in this court by the above named plaintiffs against your petitioner as one defendant, and against the Morrison Mill Co., a corporation, and Frank Day as co-defendants.

That your petitioner was at the time of the commencement of said action, ever since has been and now is a foreign corporation, being a corporation created and existing under the laws of the State of Michigan and by virtue thereof at all of said times was and still is a citizen and resident of the State of Michigan and a non-resident of the State of Washington; that the plaintiffs at the time of the commencement of said action were, ever since have been and still are citizens and residents of the State of Washington; that the defendants Morrison Mill Co. and Frank Day at the time of the commencement of said action were, ever since have been and still are citizens and residents of the State of Washington.

II.

That plaintiffs' original complaint herein contains allegations of negligence on the part of your peti-

tioner, as well as on the part of Morrison Mill Co., a corporation, and Frank Day, and seeks judgment against all defendants in the total sum of $10,625. That plaintiffs' original complaint herein, a part of the records and files in this cause [16] in the above entitled court, is hereby referred to and by this reference made a part hereof as though fully set forth herein. That subsequent to the filing of said complaint and within the time allowed by law, your petitioner served and filed a demurrer to said complaint upon the ground that said complaint failed to state facts sufficient to constitute a cause of action against your petitioner, and although argument has been had to the court upon said demurrer, the same remains undisposed of, and no order has been entered sustaining or overruling the same. That by reason of the fact that the defendant Morrison Mill Co., and the defendant Frank Day were citizens and residents of the State of Washington and jointly charged with negligence with your petitioner, said action was not removable under the laws of the United States pertaining to removal of actions.

III.

That on the 15th day of September, 1937, counsel for your petitioner were served by plaintiffs with an amended complaint in the above entitled action, in which the allegations of negligence as against the defendants Morrison Mill Co. and Frank Day, contained in the original complaint, were entirely omitted, and said amended complaint as to said de-

fendants Morrison Mill Co. and Frank Day is clearly demurrable in that said amended complaint fails to state facts sufficient to constitute a cause of action against said defendants, or to state any cause of action whatsoever against said defendants Morrison Mill Co. and Frank Day, or either of them, or if said amended complaint does state any cause of action as against said defendants Morrison Mill Co. and Frank Day, which this petitioner specifically denies, the said cause of action and the liability, if any, upon which the same is based, are entirely distinct, separate and separable from the cause of action alleged in said complaint against your petitioner and the liability, if any, upon which the same is based. That the liability, if any, of your petitioner, as alleged in plaintiffs' amended complaint, and the liability, if any, of said defendants Morrison Mill Co. and Frank Day, as alleged in said amended complaint, are in no sense joint, but are entirely separable; and that this suit as against [17] your petitioner constitutes a separable controversy. That your petitioner is informed and believes and therefore alleges that following the institution of this suit and prior to the service and filing of the said amended complaint, plaintiffs and said defendants Morrison Mill Co. and Frank Day entered into a combination, understanding and agreement for the settlement of the liability, if any, of said defendants Morrison Mill Co. and Frank Day to said plaintiffs, pursuant to which it was agreed between said plaintiffs and said defendants, without the

consent of your petitioner, that plaintiffs would serve and file an amended complaint, omitting any allegations of negligence as against said defendants Morrison Mill Co. and Frank Day, and in such form that the same would fail to state facts sufficient to constitute a cause of action against said defendants, and that a demurrer thereto would be entered and be by the court sustained, thus dismissing said Morrison Mill Co. and Frank Day from this action, leaving your petitioner remaining therein as sole defendant. That as a result of said agreement entered into between said plaintiffs and said Morrison Mill Co. and Frank Day, there is no controversy in actual fact between said plaintiffs and said defendants, and that the joinder of said defendants in said amended complaint as parties defendant is fraudulent, sham and fictitious, and that plaintiffs have no actual intention or purpose whatsoever of seeking or securing recovery in this action as against said defendants Morrison Mill Co. and Frank Day.

That there is in this action a controversy wholly between citizens of different states, which can be wholly and finally determined between your petitioner and the plaintiffs herein, and that said controversy is wholly between your petitioners and said plaintiffs, and that the co-defendants of your petitioner named in the plaintiff's complaint herein are not interested, in view of their settlement agreement heretofore set forth and the allegations of plaintiffs' complaint, in the determination thereof, nor are they necessary, proper or indispensable

parties to said action; and that said controversy, and this action, can be wholly and finally determined between said plaintiffs and your petitioner.

[18]

That said action did not become removable under the laws of the United States relating to removal of causes, until the service and filing of plaintiffs' amended complaint herein on or about the 15th day of September, 1937.

IV.

That said action as set forth in plaintiffs' amended complaint herein is one of a civil nature in which there is a controversy wholly between citizens of different states, plaintiffs being citizens and residents of the State of Washington and your petitioner being a citizen and resident of the State of Michigan.

V.

That in plaintiff's amended complaint herein, served and filed on or about the 15th day of September, 1937, plaintiff demands judgment in the sum of $9,850, exclusive of interest and costs, against your petitioner by reason of certain personal injuries alleged to have been sustained by said plaintiffs, as a result, among other things, of the alleged negligence on the part of your petitioner as set forth in plaintiffs' amended complaint on file herein.

VI.

That the amount in controversy in the cause of action set forth in plaintiffs' amended complaint

herein exceeds the amount or value of $3,000, exclusive of interest and costs.

VII.

That said action upon said plaintiffs' amended complaint is pending undetermined in this court, and that the time has not yet arrived in which the defendant is required by the laws of the State of Washington or the rules of the Superior Court of the State of Washington, the court in which this action is brought, to answer or otherwise plead to said amended complaint, and that no application has been made to any court or judge for the order to be applied for in this petition.

VIII.

That the alleged cause of action set forth in said amended complaint is a cause of action of which the District Court of the United States has been and is given original jurisdiction. [19]

IX.

That your petitioner desires to remove this action before the trial thereof and within thirty days from the date of the filing of this petition, into the District Court of the United States for the District in which this action is pending, to-wit, the District Court of the United States for the Western District of Washington, Northern Division and your petitioner makes and files with this petition a bond with good and sufficient surety thereon for its entering in said District Court of the United States with-

in thirty days from the filing of this petition a copy of the record in this action, and for its paying all costs which may be awarded by the said District Court of the United States for the Western District of Washington, Northern Division, if said District Court shall hold this action was wrongfully or improperly removed thereto.

X.

That your petitioner prays that said surety and said bond may be accepted and that this action may be removed into the District Court of the United States for the Western District of Washington, Northern Division, pursuant to the statutes of the United States in such cases made and provided, and that no further proceedings may be had herein in this court except the order to remove, as required by law, and that this Honorable Court make an order approving said bond and an order for the removal of this action, and to that end your petitioner will ever pray.

REPUBLIC GEAR COMPANY
a corporation
By BOGEL, BOGLE & GATES and
STANLEY B. LONG
Its Attorneys [20]

State of Washington,
County of King—ss.

Stanley B. Long, of lawful age, being first duly sworn, upon oath deposes and says:

That he is one of the attorneys of record for the defendant and petitioner Republic Gear Company, a corporation, in the above entitled cause; that said defendant and petitioner is a corporation duly organized and existing under the laws of the State of Michigan, having its principal place of business at Detroit, Michigan; that the reason this verification is made by this affiant on behalf of said defendant and petitioner is that said defendant and petitioner is a foreign corporation, to-wit, a corporation of the State of Michigan; that neither said corporation nor any of its officers is within the State of Washington, and that there is no other person than this affiant within the State of Washington who is authorized to, or is capable of, verifying the within and foregoing petition; that affiant makes this verification for and on behalf of said petitioner and defendant, being thereunto duly authorized; and that he has read the within and foregoing petition for removal, knows the contents thereof, and that the allegations contained therein are true, with the exception only of such allegations as are therein specifically stated to be on information and belief, and as to such allegations affiant believes them to be true.

STANLEY B. LONG

Subscribed and sworn to before me this 16th day of September, 1937.

A. C. SPENCER, Jr.

Notary Public in and for the State of Washington, residing at Seattle.

[Notarial seal of A. C. Spencer, Jr.,

Commission expires Mar. 15, 1940]

[Endorsed]: Skagit County, Wash. Filed Sept. 16, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy. [21]

[Title of Court and Cause Skagit County.]

UNDERTAKING

Know All Men by These Presents: That we, Republic Gear Company, a corporation organized and existing under and by virtue of the laws of the State of Michigan, as Principal, and St. Paul-Mercury Indemnity Company of St. Paul, a corporation duly authorized to carry on a surety business in the State of Washington, and duly authorized to execute the within bond as surety, as Surety, are held and firmly bound unto Melvin Whitehead and Fern Peck, by her guardian ad litem, Ellen Barnard, their heirs, representatives, successors and assigns, in the penal sum of Five Hundred Dollars ($500), lawful money of the United States, for the payment of which sum well and truly to be made unto the said Melvin Whitehead and Fern Peck, by her guardian ad litem, Ellen Barnard, their heirs, representatives, successors and assigns, jointly and severally, firmly by these presents.

This bond is upon the condition nevertheless, that Whereas, said Republic Gear Company, a corporation, the principal obligor herein, and one of the defendants in the above entitled action, has filed its petition in the above entitled action in the Superior Court of the State of Washington for Skagit County, for the removal of a certain cause therein pending wherein the said Melvin Whitehead and Fern Peck, by her guardian ad litem, Ellen Barnard, are plaintiffs, and the said Republic Gear Company, a corporation, and Morrison Mill Co., a corporation, and Frank Day, are defendants, to the District Court of the United States for the Western District of Washington Northern Division: [22]

Now, therefore, if the said Republic Gear Company, a corporation, shall enter into the said District Court of the United States for the Western District of Washington, Northern Division, within thirty days from the filing of the petition for the removal of said cause, a copy of the record in said action, and shall well and truly pay all costs that may be awarded by the said District Court of the United States for the Western District of Washington, Northern Division, if the said District Court shall hold that said action was wrongfully or improperly removed thereto, then this obligation shall be null and void, otherwise it shall remain in full force and effect.

In witness whereof, said Republic Gear Company, a corporation, as Principal, and said St. Paul-Mercury Indemnity Company of St. Paul a corporation,

as Surety, have caused this instrument to be executed by their proper officers thereunto duly authorized this 16th day of September, 1937.

REPUBLIC GEAR COMPANY
a corporation
By BOGLE, BOGLE & GATES
STANLEY B. LONG
Its Attorney,

Principal

ST. PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL
a corporation
By CASSIUS GATES
Its Attorney-in-Fact

Surety

[Seal of St. Paul-Mercury Indemnity Company of St. Paul corporate seal 1926 Delaware]

[Endorsed]: Skagit County, Wash. Filed Sept. 16, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy.

Civil Journal 42, page 264. [23]

[Title of Court and Cause Skagit County.]

ACCEPTANCE OF SERVICE

The undersigned attorney for the plaintiff hereby acknowledges service this day of the following papers in the above entitled cause, before filing:

1. Petition for Removal,
2. Undertaking,
3. Notice of Removal,
4. Order of Removal,
5. This Acceptance of Service.

Dated at Seattle, Washington, this 16th day of September, 1937.

WARREN J. GILBERT
Attorney for Plaintiff.

[Endorsed]: Skagit County, Wash. Filed Sept. 16, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy. [24]

[Title of Court and Cause Skagit County.]

NOTICE OF REMOVAL

To: Melvin Whitehead and Fern Peck, by her guardian ad litem, Ellen Barnard, Plaintiffs above named, and to Warren J. Gilbert, their attorney:

You and Each of You Will Please Take Notice that the defendant Republic Gear Company, a corporation, intends to file its petition and bond for removal, copies of which petition and bond are attached hereto, and that on the 17th day of Sept.,

1937, at the hour of 1:30 o'clock A. M., or as soon thereafter as counsel can be heard, said defendant will apply to the presiding judge of the above entitled court for an order removing the above named cause into the District Court of the United States for the Western District of Washington, Northern Division, pursuant to the statutes of the United States made and provided therefor.

BOGLE, BOGLE & GATES
STANLEY B. LONG
Attorneys for Defendant
Republic Gear Company,
a corporation.

[Endorsed]: Skagit County, Wash. Filed Sept. 16, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy. [25]

[Title of Court and Cause Skagit County.]

AMENDED COMPLAINT

Comes now the plaintiffs and for an amended complaint against the defendants allege as follows:

I.

Melvin Whitehead, for his first cause of action against the defendants alleges: That the Morrison Mill Co., is a corporation, duly organized and existing under and by virtue of the laws of the State of Washington, doing business in Skagit County, State of Washington, and that at all times herein men-

tioned, was the owner of a Kenworth truck, registration number 20563.

II.

That at all times hereinafter mentioned, the defendant Republic Gear Company was and now is a corporation, duly organized and existing with its principal office at Detroit, Michigan, but with an office for the transaction of business in the City of Seattle, King County, Washington, and that said defendant during all the times hereinafter mentioned was and still is, doing business within the State of Washington.

III.

That Melvin Whitehead, at all times herein mentioned, was the owner of one Dodge coupe, 1936 model, engine number D2-135527 and serial number 4026463.

IV.

That at all times hereinafter referred to, the defendant Republic Gear Company was and now is engaged in the manufacturing, distributing and sale of axles for use in trucks, and at some time prior to November 12, 1936, had sold to the Lewis Motor Company of Bellingham, for the [26] purpose of resale to the public, an axle which appeared to be, and if it had not been for the defects hereinafter set forth, would have been, a suitable, safe and proper axle to be installed in the truck of said Morrison Mill Company as hereinafter described, and on or about the 12th day of November, 1937, said Morrison Mill Company purchased the said axle from

the said Lewis Motor Company and installed the same in the said Kenworth, two ton truck, registration number 20463, then owned by said Morrison Mill Company.

V.

That the said Republic Gear Company during all the times prior to the said purchase and subsequent thereto advertised and represented to the public that the said acle was of chrome steel, and was a suitable, safe and proper axle to be installed and used in such trucks as the said truck of said Morrison Mill Company, and there was nothing about the said axle which was or would be apparent to a purchaser in the exercise of ordinary care to indicate to such purchaser, or give to such purchaser any notice of, the defects hereinafter set forth.

VI.

That as a proximate result of the negligence of the defendant Republic Gear Company in its manufacture and inspection the said axle was defective in the following particulars, to-wit: It was constructed of defective material, in its construction it had been treated with improper heat treatment, it had been shaped with improper fillets, and, in consideration of the other defects hereinabove specified, it was of inadequate shape and size.

VII.

That the said Morrison Mill Company, after purchasing the said axle installed the same upon its said

truck, and in the course of the use of the said truck between the said date of purchase and the time of the accident hereinafter set forth, and as a result of each and all of the defects hereinabove set forth, a defect known to metallurgists as a "fatigue fracture" developed in the said axle. [27]

VIII.

That about midnight of the 26th day of January, 1937, while the said truck of said Morrison Mill Company was being operated upon the Pacific Highway upon the bridge whereby the said Pacific Highway crosses the Skagit River in Skagit County, Washington, and as a proximate result of the defects in said axle as hereinbefore set forth, the said axle broke, and the said truck thereby became disabled upon the said Pacific Highway, and unable to move under its own power, and thereupon remained on the west half of said paved highway directly in the lane of travel on said highway for traffic proceeding in a southerly direction.

IX.

That while the said truck was so stalled as aforesaid on said highway as a proximate result of the negligence of the said defendant Republic Gear Company and the defendant Morrison Mill Company, as hereinbefore set forth, the car which was being driven by the plaintiff Melvin Whitehead in a careful and prudent manner came in violent collision with the said truck, causing the damages hereinafter alleged.

X.

That as the result of the negligence of the said defendants, this plaintiff suffered severe personal injury, consisting of a blow to the top of his head, cuts on his forehead and a severe blow to his chest, which cause him and still continues to cause him great pain and suffering, on account of which he was unable to work for a period of sixty days. That he was capable of earning $100.00 per month as a truck driver during said time and was regularly employed at the time of said accident. That he has been required to pay medical expenses and Doctors bills in the sum of $100.00, all to his damage in the sum of $2,000.00.

For a Second Cause of Action, the plaintiff complains of the defendants and further alleges:

I.

That he repeats all of the allegations contained in paragraph I to IX both inclusive, of his first cause of action and makes the same a part hereof, by this reference.

II.

That as a proximate result of the defendants aforesaid negligence, [28] as hereinabove alleged, the 1936 Dodge coupe, serial number 4026463 and engine number D2-135527 owned by the plaintiff was completely demolished to his damage in the sum of $775.00.

And For a Third Cause of Action against the defendants, Fern Peck, by her guardian ad litem, alleges:

I.

That Ellen Barnard has been appointed guardian ad litem for the plaintiff Fern Peck, and authorized to bring this action.

II.

That the plaintiff re-alleges and makes a part of this cause of action, paragraphs I, II, III, IV, V, VI, VII, VIII and IX, of the cause of action of Melvin Whitehead and by reference, makes all of said allegations a part of this cause of action.

III.

That as the proximate result of the negligence of the said defendants, this plaintiff received several severe lacerations on her face, extending from the line of her hair in the middle of her forehead, down to a point between the two eye brows; a cut across her nose from one cheek to the other, cutting into the bridge of the nose, severing of upper lip below the right nostril, a cut on the right side of her chin, a cut on the lower lip and a cut on the right side of her head. That it was necessary to use twenty-seven sutures in order to bind said lacerations and that as a result thereof, the plaintiff has permanent scars left on her face, which change the contour of her face and mouth and cause her great embarrassment and mental anguish. That said scars have permanently disfigured and changed the contour and expression of her face. That the plaintiff was an attractive girl before said accident, but now she has been made unattractive by reason of said permanent

scars. That the plaintiff received a severe blow to her back and both knees were injured, all said injuries causing her severe pain and discomfort. That the plaintiff was an able bodied person, capable of earning $90.00 per month at the time of said accident and was employed at the wage of $60.00 per month and board, at the time of said accident; and she was prevented by reason of said injuries from performing said duties for a period of two months, all to [29] her damage in the sum of $7,500.00. That it was necessary for the plaintiff to employ medical assistance and hospital aid, all for the reasonable sum of $250.00, which it will be necessary for her to pay.

Wherefore, plaintiffs pray for judgment against the defendants, in the following sums, to-wit:

On their first cause of action, the sum of $2100.00.

On their second cause of action the sum of $7750.00, and for such other and further relief as the pleadings, files and evidence will warrant.

WARREN J. GILBERT
Attorney for Plaintiffs

[Endorsed]: Skagit County, Wash. Filed Sept. 21, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy. [30]

State of Washington
County of Skagit—ss.

Ellen Barnard, being first duly sworn upon oath deposes and says: That she is the guardian ad litem for the plaintiff Fern Peck, named in the above en-

titled action. That she makes this verification as such guardian ad litem, that she has read the above and foregoing complaint, knows the contents thereof and that the allegations contained therein are true, as she verily believes.

ELLEN BARNARD

Subscribed and sworn to before me this 9th day of Sept. 1937.

WARREN J. GILBERT

Notary Public in and for the State of Washington, residing at Mount Vernon. [31]

[Title of Court and Cause Skagit County.]

ORDER OF REMOVAL

At this time comes the defendant Republic Gear Company, a corporation, and presents a petition asking for the removal of the above entitled action from the Superior Court of the State of Washington for Skagit County, to the District Court of the United States for the Western District of Washington, Northern Division, which petition sets forth the reasons for said removal, to-wit:

That this action is of a civil nature, and that the amount in dispute as against this petitioning defendant, exclusive of interest and costs, exceeds the sum of $3,000; that the controversy in this action as between plaintiffs and this petitioning defendant is between citizens of different states, plaintiffs being citizens and residents of the State of Washington,

and this petitioning defendant being a citizen and resident of the State of Michigan.

And it appearing from said petition that said action is pending undetermined in this court, and that said action became removable for the first time upon the serving and filing of plaintiffs' amended complaint herein on or about the 15th day of September, 1937, and that the time has not yet arrived at which said petitioning defendant is required by the laws of the State of Washington or the rules of the Superior Court of the State of Washington, the court in which this action is brought, to answer or otherwise plead to plaintiffs' amended complaint herein, and that no application has previously been made to any court or judge for the order applied for in said petition; [32]

And it further appearing to the court that this defendant has presented a bond to this court as provided by law, and it further appearing to the court that said bond and petition are sufficient to authorize the removal of said action into the District Court of the United States for the Western District of Washington, Northern Division, now, therefore, it is hereby.

Considered, Ordered and Adjudged that said bond be and it is hereby accepted and approved, and that this court proceed no further in this action, and that the same be and it is hereby transferred to the District Court of the United States for the Western District of Washington, Northern Division, and that the clerk of this court prepare and file a com-

plete copy of the record of this court in the above entitled action, and certify to the same as a copy of said record, and forward the same to the Clerk of the District Court of the United States for the Western District of Washington, Northern Division, at Seattle, in the County of King, and State of Washington, within thirty days from the filing of the petition herein. To which Plaintiff excepts & exception allowed.

Dated at Seattle, Washington, in open court, this 21st day of September, 1937.

W. L. BRICKEY
Judge

Presented by:
STANLEY B. LONG
of Attorneys for Defendant
Republic Gear Company.

[Endorsed]: Skagit County, Wash. Filed Sept. 21, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy. [33]

[Title of Court and Cause Skagit County.]

PRAECIPE FOR TRANSCRIPT OF RECORD ON REMOVAL

To the Clerk of the Above Entitled Court:

Please prepare a full and complete transcript of the record of the above entitled cause for removal to

the United States District Court for the Western District of Washington, Northern Division.

BOGLE, BOGLE & GATES
STANLEY B. LONG
Attorneys for Defendant
Republic Gear Company,
a corporation.

[Endorsed]: Skagit County, Wash. Filed Sept. 21, 1937. Will B. Ellis, County Clerk. By Arthur Eliason, Deputy. [34]

In the Superior Court of the State of Washington for Skagit County

No. 15524

MELVIN WHITEHEAD and FERN PECK, by her guardian ad litem, ELLEN BARNARD,
Plaintiffs

vs.

MORRISON MILL CO., a corporation, REPUBLIC GEAR COMPANY, a corporation, and FRANK DAY,
Defendants.

CERTIFICATE

I, Will B. Ellis, County Clerk of Skagit County, and ex-officio Clerk of the Superior Court of the State of Washington in and for said county, do hereby certify that the annexed and foregoing is a

full, true and correct copy of the Petition for Appointment of Guardian ad Litem, Order Appointing Guardian ad Litem, Summons and Complaint, Affidavit of Service, Demurrer, Notice of Issue of Law and Note for Motion Calendar, Petition for Removal, Acceptance of Service, Notice of Removal, Undertaking, Amended Complaint, Order of Removal, and Praecipe for Transcript of record on Removal in the above entitled (action) as the same now appear on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court this 22nd day of September, 1937.

[Seal] WILL B. ELLIS,
Clerk

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 20, 1937. Edgar M. Lakin, Clerk. By S. Cook, Deputy. [35]

[Title of Court and Cause, U. S. District Court.]

21161

ORDER SUSTAINING DEMURRER OF DEFENDANT AND REPUBLIC GEAR COMPANY.

This matter having come on duly and regularly for hearing before the undersigned judge of the above entitled court upon the demurrer of defendant Republic Gear Company to plaintiff's amended

complaint herein, and each cause of action therein contained, upon the ground and for the reason that the same fails to state facts sufficient to constitute a cause of action against said defendant Republic Gear Company, and plaintiffs being represented by their attorneys, Mr. Warren J. Gilbert, and defendant Republic Gear Company, being represented by its attorneys, Messrs. Bogle, Bogle & Gates and Stanley B. Long, and the court having heard argument of counsel, and having considered written briefs filed by both parties above mentioned, and being in the premises fully advised, it is, now therefore, hereby

Ordered that the demurrer of the defendant Republic Gear Company to plaintiff's amended complaint herein, and both causes of action therein contained, be and the same is hereby sustained, to which plaintiffs except and their exceptions are hereby allowed.

It Is Further Ordered, that the plaintiffs and each of them shall have ten days time from the date of filing this order to file a second amended complaint.

Done in open Court this 26th day of March, 1938.

JOHN C. BOWEN

U. S. District Judge.

Approved as to form and notice of presentation expressly waived:

WARREN J. GILBERT
Attorneys for Plaintiffs.

Presented by:
STANLEY B. LONG

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Mar. 26, 1938. Edgar M. Lakin, Clerk. By S. Cook, Deputy. [36]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 21161.

MELVIN WHITEHEAD and FERN PECK, by her guardian ad litem, Ellen Barnard,
Plaintiffs,

vs.

REPUBLIC GEAR COMPANY, a corporation,
Defendant.

SECOND AMENDED COMPLAINT

Come now the plaintiffs and in accordance with permission given by the court and for a second amended complaint against the defendant allege as follows:

I.

Plaintiff Melvin Whitehead, for his first cause of action against the defendant alleges: That at all times hereinafter mentioned, the defendant Republic Gear Company was and now is a corporation, duly organized and existing with its principal office at Detroit, Michigan, but with an office for the transaction of business in the City of Seattle, King County, Washington, and that said defendant during all the times hereinafter mentioned was and still is, doing business within the State of Washington.

II.

That Melvin Whitehead, at all times herein mentioned, was the owner of one Dodge coupe, 1936 model, engine number D2-135527 and serial number 4026463.

III.

That at all times herein mentioned, Morrison Mill Company, a corporation, was the owner of a Kenworth truck, registration number 20463. [37]

IV.

That at all times hereinafter referred to, the defendant Republic Gear Company was and now is engaged in the manufacturing, distributing and sale of axles for use in trucks, and at some time prior to November 12, 1936, had sold to the Lewis Motor Company of Bellingham, for the purpose of resale to the public, an axle which appeared to be, and if it had not been for the defects hereinafter set forth, would have been, a suitable, safe and proper axle to

be installed in the truck of said Morrison Mill Company as hereinafter described, and on or about the 12th day of November, 1937, said Morrison Mill Company purchased the said axle from the said Lewis Motor Company and installed the same in the said Kenworth, two ton truck, registration number 20463, then owned by said Morrison Mill Company.

V.

That the said Republic Gear Company during all the times prior to the said purchase and subsequent thereto advertised and represented to the public that the said axle was of chrome steel and was a suitable, safe and proper axle to be installed and used in such trucks as the said truck of said Morrison Mill Company, and there was nothing about the said axle which was or would be apparent to a purchaser in the exercise of ordinary care to indicate to such purchaser, or give to such purchaser any notice of, the defects hereinafter set forth, and at all times up to the time of the accident hereinafter set forth, the said Morrison Mill Company had no notice or knowledge, or any reasonable opportunity to have notice or knowledge, of the defects of the said axle hereinafter set forth.

VI.

That as a proximate result of the negligence of the defendant Republic Gear Company in its manufacture and inspection [38] the said axle was defective in the following particulars, to-wit: It was constructed of defective material, in its construc-

tion it had been treated with improper heat treatment, it had been shaped with improper fillets, and, in consideration of the other defects hereinabove specified, it was of inadequate shape and size.

VII.

That the said Morrison Mill Company, after purchasing the said axle installed the same upon its said truck, and in the course of the use of the said truck between the said date of purchase and the time of the accident hereinafter set forth, and as a result of each and all of the defects hereinabove set forth, a defect known to metallurgists as a "fatigue fracture" developed in the said axle.

VIII.

That about midnight of the 26th day of January, 1937, while the said truck of said Morrison Mill Company was being operated upon the Pacific Highway upon the bridge whereby the said Pacific Highway crosses the Skagit River in Skagit County, Washington, and as a proximate result of the defects in said axle as hereinbefore set forth, the said axle broke, and the said truck thereby became disabled upon the said Pacific Highway, and unable to move under its own power, and thereupon stopped on the west half of said paved highway directly in the lane of travel on said highway for traffic proceeding in a southerly direction.

IX.

That while the said truck was so stopped as aforesaid on said highway as a proximate result of the negligence of said defendant Republic Gear Company, a corporation, and before it could be removed from the said highway, the car which was being driven by the plaintiff Melvin Whitehead in a careful and prudent [39] manner came into violent collision with the said truck, causing the damages hereinafter alleged.

X.

That as the result of the negligence of the said defendant, this plaintiff suffered severe personal injury, consisting of a blow to the top of his head, cuts on his forehead and a severe blow to his chest, which caused him and still continues to cause him great pain and suffering, on account of which he was unable to work for a period of sixty days. That he was capable of earning $100.00 per month as a truck driver during said time and was regularly employed at the time of said accident. That he has been required to pay medical expenses and doctors bills in the sum of $100.00, all to his damage in the sum of $2,000.00.

For a Second Cause of Action, the plaintiff Melvin Whitehead complains of the defendant and further alleges:

I.

That he repeats all of the allegations contained in paragraphs I to IX, both inclusive, of his first cause of action and makes the same a part hereof by this reference.

II.

That as a proximate result of the defendant's aforesaid negligence, as hereinabove alleged, the 1936 Dodge coupe, serial number 4026463 and engine number D2-135527 owned by the plaintiff was completely demolished to his damage in the sum of $775.00.

And For a Third Cause of Action against the defendant, Fern Peck, by her guardian ad litem, alleges: [40]

I.

That Ellen Barnard has been appointed guardian ad litem for the plaintiff Fern Peck, and authorized to bring this action.

II.

That the plaintiff re-alleges and makes a part of this cause of action, paragraphs I, II, III, IV, V, VI, VII, VIII and IX of the cause of action of Melvin Whitehead and by reference, makes all of said allegations a part of this cause of action.

III.

That as the proximate result of the negligence of the said defendant, this plaintiff received several severe lacerations on her face, extending from the line of her hair in the middle of her forehead, down to a point between the two eye brows; a cut across her nose from one cheek to the other, cutting into the bridge of the nose, severing of upper lip below the right nostril, a cut on the right side of her chin, a cut on the lower lip and a cut on the right side of

her head. That it was necessary to use twenty-seven sutures in order to bind said lacerations and that as a result thereof, the plaintiff has permanent scars left on her face, which change the contour of her face and mouth and cause her great embarrassment and mental anguish. That said scars have permanently disfigured and changed the contour and expression of her face. That the plaintiff was an attractive girl before said accident, but now she has been made unattractive by reason of said permanent scars. That the plaintiff received a severe blow to her back and both knees were injured, all said injuries causing her severe pain and discomfort. That the plaintiff was an able bodied person, capable of earning $90.00 per month at the time of said accident and was employed at the wage of $60.00 per month and board, at the time of said accident; and she was prevented by reason of said injuries from performing said duties for a period of two months, all to her damage in the [41] sum of $7,500.00. That it was necessary for the plaintiff to employ medical assistance and hospital aid, all for the reasonable sum of $250.00, which it will be necessary for her to pay.

Wherefore, plaintiffs pray for judgment against the defendant as follows, to-wit:

Plaintiff Melvin Whitehead prays judgment against the defendant on his first cause of action in the sum of $2100.00, and upon his second cause of action in the sum of $775.00.

The plaintiff Fern Peck, by her guardian ad litem, Ellen Bernard, prays judgment against the said defendant in the sum of $7750.00.

And plaintiffs pray for interest on said sums, and for costs of suit, and for such other relief as to the court shall seem just and proper.

SHANK, BELT, RODE & COOK
Attorneys for Plaintiffs.

Office and postoffice address:
1401 Joseph Vance Building,
Seattle, King County, Washington. [42]

State of Washington
County of Skagit—ss:

Ellen Barnard, being first duly sworn, upon oath deposes and says: That she is the guardian ad litem for the plaintiff Fern Peck, named in the above entitled action. That she makes this verification as such guardian ad litem. That she has read the above and foregoing complaint, knows the contents thereof and that the allegations contained therein are true, as she verily believes.

MRS. ELLEN BARNARD

Subscribed and sworn to before me this 26th day of March, 1938.

[Seal] WARREN J. GILBERT
Notary Public in and for the State of Washington, residing at Mt. Vernon.

Copy received Mar. 30, 1938.
BOGLE, BOGLE & GATES.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Mar. 30, 1938. Edgar M. Lakin, Clerk. By Elmo Bell, Deputy. [43]

[Title of District Court and Cause.]

DEMURRER

(to Second Amended Complaint)

Comes now Republic Gear Company, the defendant above-named, through its undersigned attorneys, and demurs to plaintiff's second amended complaint herein and each cause of action therein contained upon the ground and for the reason that same fails to state facts sufficient to constitute a cause of action against this defendant, or otherwise.

BOGLE, BOGLE & GATES
Attorneys for Defendant
Republic Gear Company.

Copy hereof received this April 2, 1938.
SHANK, BELT & RODE.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 2, 1938. Edgar M. Lakin, Clerk. By S. Cook, Deputy. [44]

[Title of District Court and Cause.]

MOTION TO STRIKE SECOND AMENDED COMPLAINT

Comes now the defendant, Republic Gear Company, and moves the court for an order striking plaintiff's second amended complaint herein upon the ground and for the reason that said second amended complaint is sham, frivolous and contains

no new, different or additional material allegations from the allegations contained in plaintiff's amended complaint herein to which this court has heretofore sustained a demurrer as appears from the court's order of March 26, 1938.

This motion is based upon the records and files herein and upon the affidavit of Stanley B. Long, one of the attorneys for defendant, Republic Gear Company, hereto attached.

BOGLE, BOGLE & GATES
Attorneys for Defendant.

State of Washington,
County of King—ss.

Stanley B. Long, being first duly sworn, upon oath deposes and says:

That he is an attorney at law, a member of the law firm of [45] Bogle, Bogle & Gates, attorneys for defendant Republic Gear Company, and that he makes this affidavit in support of the foregoing motion to strike plaintiff's second amended complaint herein. That on or about the 24th day of April, 1937, an action was instituted in the Superior Court of the State of Washington for Skagit County by Melvin Whitehead and Fern Peck, by her guardian ad litem, Ellen Barnard, plaintiffs, versus Morrison Mill Company, a corporation, and Republic Gear Company, a corporation, and Frank Day, defendants, said action arising out of the same accident as that described in plaintiff's amended complaint and second amended complaint herein; that said com-

plaint contained certain allegations of negligence directed to defendants Morrison Mill Company and the driver of the truck, Frank Day, in addition to the defendant Republic Gear Company; and that said defendant Republic Gear Company served and filed its demurrer to plaintiff's complaint in said original action upon the ground and for the reason that said complaint, as to Republic Gear Company, failed to state facts sufficient to constitute a cause of action. That prior to the court's ruling upon said demurrer, plaintiff filed an amended complaint in said action in said court. That in the original action above referred to, the plaintiffs were represented by their attorney, Warren J. Gilbert, and the defendants Morrison Mill Company and Frank Day were represented by the law firm of Shank, Belt, Rode & Cook of Seattle, Washington, the defendant Republic Gear Company being represented by the law firm of Bogle, Bogle & Gates and your affiant. That prior to the filing of the plaintiff's amended complaint above referred to, your affiant is informed and believes that said defendant Morrison Mill Company entered into negotiations for and consumated a settlement of plaintiff's cause of action against said defendant, said negotiations for settlement and consumation thereof being carried on and conducted by the said [46] Warren J. Gilbert, as attorney for plaintiff, and the law firm of Shank, Belt, Rode & Cook, as attorneys for said Morrison Mill Company; that after completing said settlement, your affiant is informed and believes, and, therefore, al-

leges that arrangement was made between said counsel representing the plaintiffs and said defendant Morrison Mill Company for plaintiff to file an amended complaint joining said Morrison Mill Company as a party defendant although eliminating any allegations of negligence against said defendant, thereby making said complaint as to said defendant Morrison Mill Company clearly demurrable. That immediately following the service of said amended complaint and in view of the failure to allege any negligence on the part of said Morrison Mill Company, all in pursuance of an agreement entered into for settlement purposes between plaintiffs and defendant Morrison Mill Company through their respective counsel, a petition for the removal of said action to the above entitled court was filed and said cause was removed in pursuance thereto. That thereafter your affiant, as attorney for defendant Republic Gear Company, served and filed his demurrer to plaintiff's complaint herein, which, after argument and submission of briefs, was sustained by the court and an order entered accordingly. That upon the request of Warren J. Gilbert, as attorney for plaintiff, for an additional ten days in which to file the second amended complaint, a provision permitting said procedure was included in said order.

That on March 30, 1938, your affiant, as attorney for said Republic Gear Company, received notice of withdrawal of Warren J. Gilbert as attorney for plaintiffs and the notice of appearance of

Messrs. Shank, Belt, Rode & Cook as substituted attorneys for plaintiff and was, on said date, served with the second amended complaint herein above referred to. That said second amended complaint is [47] wholly sham and frivolous and fails to set forth any new, different or material allegations of negligence on the part of said Republic Gear Company than those heretofore set forth and pleaded in plaintiff's amended complaint to which this court sustained a demurrer upon the ground that insufficient facts were therein set forth to constitute a cause of action against said defendant Republic Gear Company.

That your affiant is informed and believes and, therefore, alleges that a settlement has heretofore been reached and consumated between plaintiffs and said defendants Morrison Mill Company; that said action is now being prosecuted by the attorneys for said Morrison Mill Company in an attempt to recover a portion of or all the amount so paid the plaintiff in settlement of the cause of action against the defendant Morrison Mill Company. That said action is not being prosecuted in good faith; that in view of said settlement between plaintiffs and said defendant Morrison Mill Company, no recovery could be had against this defendant, Republic Gear Company, in any event as a joint-tort-feasor. That by reason of the collusive action and agreement between said plaintiffs and the representative of said Morrison Mill Company, who are not made parties defendant in said second amended

complaint, defendant Republic Gear Company will be put to considerable expense and inconvenience and the time of this court will be taken up and consumed by the useless and frivolous action. That said second amended complaint herein should be stricken and that the cause of action set forth in plaintiff's amended complaint herein be dismissed with prejudice and with costs to said defendant Republic Gear Company.

STANLEY B. LONG

Subscribed and sworn to before me this 1st day of April, 1938.

[Seal] J. CLARE BALL

Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 2, 1938. Edgar M. Lakin, Clerk. By S. Cook, Deputy. [48]

[Title of District Court and Cause.]

ORDER SUSTAINING DEMURRER OF DEFENDANT REPUBLIC GEAR COMPANY TO PLAINTIFFS' SECOND AMENDED COMPLAINT.

This matter having come on duly and regularly for hearing before the undersigned judge of the above entitled court upon the demurrer of defendant Republic Gear Company to plaintiffs' second

amended complaint herein, and upon the motion of defendant Republic Gear Company to strike plaintiffs' second amended complaint herein, and plaintiffs being represented by their attorneys of record, Messrs. Shank, Belt, Rode & Cook, and defendant being represented by its attorneys, Messrs. Bogle, Bogle & Gates, Stanley B. Long and Donald E. Leland, and the court having heard argument of counsel and having considered written briefs filed by both parties herein, and being in the premises fully advised, and the court having orally ruled that defendant's motion to strike plaintiff's second amended complaint herein is well taken and is granted, and the court having orally sustained defendant's demurrer to plaintiff's second amended complaint herein, and being in the premises fully advised, it is, now, therefore, hereby

Ordered, Adjudged and Decreed that the demurrer of the defendant Republic Gear Company to plaintiffs' second amended complaint herein and each cause of action therein contained be and the same is hereby sustained.

It Is Hereby Further Ordered, Adjudged and Decreed that defendant's motion to strike plaintiffs' second amended complaint be and the same is hereby granted.

It Is Further Ordered that plaintiffs be not permitted to file a further amended complaint herein, and said action and each cause of action therein contained be and the same is hereby dismissed with

prejudice and with costs in favor of said defendant Republic Gear Company. [49]

Plaintiffs except to the foregoing, and their exception is hereby allowed.

Done in Open Court this 3rd day of May, 1938.

JOHN C. BOWEN
District Judge

Approved as to form:
SHANK, BELT, RODE & COOK
Attorneys for Plaintiff

Presented by:
STANLEY B. LONG
of Bogle, Bogle & Gates,
Attorneys for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 3, 1938. Edgar M. Lakin, Clerk. By S. Cook, Deputy. [50]

[Title of District Court and Cause.]

NOTICE OF APPEAL AND ALLOWANCE

The above named plaintiffs, Melvin Whitehead and Fern Peck, by her guardian ad litem, Ellen Barnard, conceiving themselves aggrieved by the final judgment of dismissal entered on May 2, 1938, in the above entitled proceeding, do hereby appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and they pray that this their appeal may be allowed; and

that a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

SHANK, BELT, RODE & COOK
Attorneys for Plaintiffs and Appellants, 1401 Joseph Vance Building, Seattle, Washington.

And now, on this 15th day of June, 1938, it is Ordered that the above appeal be allowed as prayed for.

JOHN C. BOWEN
District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 15, 1938. Edgar M. Lakin, Clerk. By Elmo Bell, Deputy. [51]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS.

Come now the above named plaintiffs and appellants and make and file this their assignment of errors:

1. The said District Court erred in sustaining the demurrer to the second amended complaint of these plaintiffs.

2. The said District Court erred in striking plaintiffs' second amended complaint herein.

3. The said District Court erred in dismissing the said action.

SHANK, BELT, RODE & COOK
Attorneys for Plaintiffs and Appellants.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 15, 1938. Edgar M. Lakin, Clerk. By Elmo Bell, Deputy. [52]

[Title of District Court and Cause.]

APPEAL BOND

Know All Men by These Presents that we, Melvin Whitehead and Fern Peck, by her guardian ad litem, Ellen Barnard, as principal, and National Surety Corporation, a New York Corporation, authorized to transact surety business in the State of Washington, as surety, are held and firmly bound unto the above named Republic Gear Company, a corporation, in the sum of Five Hundred Dollars ($500.00), to be paid to the said Republic Gear Company, a corporation, for the payment of which well and truly to be made, we bind ourselves, and each of us, jointly and severally, firmly by these presents.

Dated this 14th day of June, 1938.

Whereas the above named Melvin Whitehead and Fern Peck, by her guardian ad litem, Ellen Barnard, have prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Cir-

cuit to reverse the judgment rendered in the above entitled suit;

Now, Therefore, the condition of this obligation is such that if the above named Melvin Whitehead and Fern Peck, by her guardian ad litem, Ellen Barnard, shall prosecute the said appeal to effect and answer all damages and costs, if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

MELVIN WHITEHEAD
FERN PECK,
By her guardian ad litem,
By SHANK, BELT, RODE & COOK
Their Attorneys. Principal
NATIONAL SURETY
CORPORATION
By J. H. LOBDELL
Attorney-in-Fact. Surety.

The above bond approved this 15th day of June, 1938.

[Seal] JOHN C. BOWEN
District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 15, 1938. Edgar M. Lakin, Clerk. By Elmo Bell, Deputy. [53]

[Title of District Court and Cause.]

PRAECIPE FOR RECORD

To the Clerk of the above described Court:

You are requested to take a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to an appeal allowed in the above entitled cause, and to include in such Transcript of Record the following, to-wit:

1. Transcript of Record from the Superior Court of Skagit County, Washington.
2. Order Sustaining Demurrer to First Amended Complaint.
3. Second Amended Complaint.
4. Demurrer to Second Amended Complaint.
5. Motion to Strike Second Amended Complaint.
6. Order Sustaining Demurrer to Plaintiffs' Second Amended Complaint and Dismissing Action.
7. Notice of Appeal and Allowance.
8. Assignment of Errors.
9. Appeal Bond.
10. Original Citation.
11. This Praecipe.

SHANK, BELT, RODE & COOK
Attorneys for Plaintiffs and Appellants.

Copy hereof received this 16th day of June, 1938.

BOGLE, BOGLE & GATES
Attorneys for Defendant and Respondent, Republic Gear Company, a corporation.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 16, 1938. Edgar M. Lakin, Clerk. By S. Cook, Deputy. [54]

[Title of District Court and Cause.]

I, Edgar M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 54, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit of Appeals for the Ninth Circuit, to-wit:

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return, 120 folios at .15¢	$18.00
Appeal fee (Sec. 5 of Act)	5.00
Certificate of Clerk to Transcript of Record	.50
Total	$23.50

I hereby certify that the above cost for preparing and certifying record, amounting to $23.50, has been paid to me by the attorneys for the appellant.

I further certify that I attach hereto and transmit herewith the original citation on appeal issued in this cause. [55]

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 25th day of June, 1938.

[Seal] EDGAR M. LAKIN,
Clerk of the United States District Court for the Western District of Washington.
By ELMO BELL
Deputy. [56]

United States of America—ss:

To: Republic Gear Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at the United States District Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California, thirty (30) days from the date of this citation, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States For The Western District of Washington, Northern Division, wherein Melvin Whitehead and Fern Peck, by her guardian ad litem, Ellen Barnard, are appellants, and Republic Gear Company, a corporation, is respondent, to show cause, if

any there be, why the judgment in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness, the Honorable John C. Bowen, this 15th day of June, 1938.

[Seal] JOHN C. BOWEN
District Judge.

Copy hereof received this 16th day of June, 1938.
BOGLE, BOGLE & GATES,
Attorneys for Republic Gear Co.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 15, 1938. Edgar M. Lakin, Clerk. By S. Cook, Deputy. [57]

[Endorsed]: No. 8880. United States Circuit Court of Appeals for the Ninth Circuit. Melvin Whitehead and Fern Peck by her guardian ad litem, Ellen Barnard, Appellants, vs. Republic Gear Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed July 1, 1938.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8880

IN THE UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MELVIN WHITEHEAD and FERN PECK, by her guardian ad litem, ELLEN BARNARD,
Appellants

vs.

REPUBLIC GEAR COMPANY, a corporation,
Appellee.

APPELLANTS' OPENING BRIEF

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

H. C. BELT,
SHANK, BELT, RODE & COOK,
Counsel for Appellants.

1401 Joseph Vance Bldg.
Seattle, Washington

METROPOLITAN PRESS, SEATTLE, U.S.A.

No. 8880

IN THE UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MELVIN WHITEHEAD and FERN PECK, by her guardian ad litem, ELLEN BARNARD,
Appellants

vs.

REPUBLIC GEAR COMPANY, a corporation,
Appellee.

APPELLANTS' OPENING BRIEF

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

H. C. BELT,
SHANK, BELT, RODE & COOK,
Counsel for Appellants.

1401 Joseph Vance Bldg.
Seattle, Washington

Statutes Cited

Text Books, etc., Cited

Cases Cited

No. 8880

IN THE UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MELVIN WHITEHEAD and FERN PECK, by her guardian ad litem, ELLEN BARNARD,
Appellants

vs.

REPUBLIC GEAR COMPANY, a corporation,
Appellee.

APPELLANTS' OPENING BRIEF

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

(b) Jurisdictional Facts and Law

This action was originally begun by the filing of a complaint in the Superior Court of Skagit County, Washington, by the appellants (citizens of the State of Washington) against Morrison Mill Co. (a corporation of the

State of Washington) and the appellee, Republic Gear Company (a corporation of the State of Michigan). R. 7. This complaint alleged different negligent acts and omissions of the two defendants which resulted in damage to the appellants. The appellee filed a demurrer to this complaint. R 15. The appellants filed in the state court an amended complaint in which all allegations of negligent acts and omissions of the Morrison Mill Co., were omitted. R. 29.

Thereupon the appellee filed petition (R. 17) and bond (R. 25) for removal to the District Court of the United States for the Western District of Washington, Northern Division, and the cause was accordingly removed to such District Court. R. 36.

The statutory provision believed to sustain the jurisdiction of the District Court is Judicial Code, §28, 28 U. S. C. §71.

The Statutory provision believed to sustain the jurisdiction of this Court is Judicial Code, §128, 28 U. S. C. §225.

(c) The Question Involved

The question involved in this appeal is: Is a manufacturer who negligently manufactures a defective automobile part, knowing that such a defect will constitute a hidden menace to the public when such defective part is used, liable to one who is injured as a proximate result of such use?

STATEMENT OF THE CASE

The Second Amended Complaint (R. 42) filed by permission of the District Court (R. 40, 41) after necessary formal allegations, and that the Morrison Mill Company was the owner of a 2-ton truck alleged as follows:

"IV.

"That at all times hereinafter referred to, the defendant Republic Gear Company was and now is engaged in the manufacturing, distributing and sale of axles for use in trucks, and at some time prior to November 12, 1936, had sold to the Lewis Motor Company of Bellingham, for the purpose of resale to the public an axle which appeared to be, and if it had not been for the defects hereinafter set forth, would have been, a suitable, safe and proper axle to be installed in the truck of said Morrison Mill Company as hereinafter described, and on or about the 12th day of November, 1936, said Morrison Mill Company purchased the said axle from the said Lewis Motor Company and installed the same in the said Kenworth, two-ton truck, registration number 20463, then owned by said Morrison Mill Company.

V.

"That the said Republic Gear Company during all the times prior to the said purchase and subsequent thereto advertised and represented to the public that the said axle was of chrome steel and was a suitable, safe and proper axle to be installed and used in such trucks as the

said truck of said Morrison Mill Company, and there was nothing about the said axle which was or would be apparent to a purchaser in the exercise of ordinary care to indicate to such purchaser, or give to such purchaser any notice of the defects hereinafter set forth, and at all times up to the time of the accident hereinafter set forth, the said Morrison Mill Company had no notice or knowledge, or any reasonable opportunity to have notice or knowledge, of the defects of the said axle hereinafter set forth.

VI.

"That as a proximate result of the negligence of the defendant Republic Gear Company in its manufacture and inspection the said axle was defective in the following particulars, to-wit: It was constructed of defective material, in its construction it had been treated with improper heat treatment, it had been shaped with improper fillets, and, in consideration of the other defects hereinabove specified, it was of inadequate shape and size.

VII.

"That the said Morrison Mill Company, after purchasing the said axle installed the same upon its said truck, and in the course of the use of the said truck between the said date of purchase and the time of the accident hereinafter set forth, and as a result of each and all of the defects hereinabove set forth, a defect known to metallurgists as a 'fatigue fracture' developed in the said axle.

VIII.

"That about midnight of the 26th day of January,

1937, while the said truck of said Morrison Mill Company was being operated upon the Pacific Highway upon the bridge whereby the said Pacific Highway crosses the Skagit River in Skagit County, Washington, and as a proximate result of the defects in said axle as hereinbefore set forth, the said axle broke, and the said truck thereby became disabled upon the said Pacific Highway, and unable to move under its own power, and thereupon stopped on the west half of said paved highway directly in the line of travel on said highway for traffic proceeding in a southerly direction.

IX.

"That while the said truck was so stopped as aforesaid on said highway as a proximate result of the negligence of said defendant Republic Gear Company, a corporation, and before it could be removed from the said highway, the car which was being driven by the plaintiff Melvin Whitehead in a careful and prudent manner, came into violent collision with the said truck, causing the damages hereinafter alleged."

Then follow the allegations of the damages suffered by the appellants "as the result of the negligence of the said defendant."

The appellee filed a demurrer to this second amended complaint upon the ground that it failed "to state facts sufficient to constitute a cause of action." R. 50.

The appellee further filed a motion to strike this second amended complaint upon the ground that it "is sham, frivolous and contains no new, different or addi-

tional material allegations from the allegations contained in plaintiff's amended complaint."

The District Court sustained the demurrer, granted the motion to strike and dismissed the action with prejudice. R. 55-57.

The appeal is taken from this order of dismissal. R. 57, 58.

(d) Specifications of Assigned Errors

The appellants rely upon the following assigned errors:

Assignment of Errors 1, 2 and 3 as set out in the Assignment of Errors filed herein. R. 58.

(e) Argument

Assignment of Error 1. The said District Court erred in sustaining the demurrer to the second amended complaint of these plaintiffs (appellants).

The cause of action stated in the second amended complaint is that the appellee placed upon the market an axle which, *through its negligence,* was defective and was bound to break under ordinary use (R. 44, 45), although it advertised and represented to the public that this axle was a suitable, safe and proper axle to be used in a truck (R. 44); that the defect was unknown to the purchaser and user, and could not have been ascertained by the use of ordinary care; that after less than three months' use the axle as a result of the defect, broke while the truck was being driven upon a bridge upon the Pacific Highway about midnight in midwinter, and before the truck could be removed from the highway, a car "which

was being driven by the plaintiff Melvin Whitehead in a careful and prudent manner" and in which the other plaintiff was a passenger, came into violent collision with the said truck.

Perhaps the best statement of the law applicable to this situation is contained in Restatement of the Law of Torts, section 395, as follows:

> "A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured."

The first case in any appellate court where this rule of law was applied to negligence in the manufacture of an automobile was probably the case of *Olds Motor Works v. Shaffer,* 145 Ky. 616, 140 S. W. 1047 (decided in 1911), where the rule was applied in favor of a passenger in a defective automobile, the court saying:

> "It is a matter of common knowledge that automobiles are equipped with engines operated by electricity, steam or gasoline, and are intended to travel over highways at a high rate of speed; and it is indispensable to the safety of persons using these vehicles that they should be safely and properly constructed with reference to the use for which they are intended. * * *
>
> "If an automobile is defectively or insufficiently

constructed, there can be no doubt that it is an imminently dangerous thing to life and limb, as much so as a railroad engine, or any other powerful machine. * * *

"And so there is no room for two opinions about the proposition, that an automobile comes well within the class of articles for which the manufacturer may be held liable to third persons for injuries sustained on account of defective construction."

Next comes the case of *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, wherein Judge Cardozo wrote:

"If the nature of the thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully."

After the handing down of this decision, the Circuit Court of Appeals, 2nd Circuit, in *Johnson v. Cadillac Motor Car Co.*, 261 Fed. 878, reconsidered a former decision and followed the rule as laid down in the above cited *Buick Motor Co.* case, saying:

"We shall not consider at length the reasons which have satisfied us that a serious mistake was made in the first decision. The reasons may be found in the opinion in the Buick case, to which we have already referred, and which render it unnecessary to traverse

the ground anew. We cannot believe that the liability of a manufacturer of automobiles has any analogy to the liability of a manufacturer of 'tables, chairs, pictures or mirrors hung on walls.' The analogy is rather that of a manufacturer of unwholesome food or of a poisonous drug. It is every bit as dangerous to put upon the market an automobile with rotten spokes as it is to send out to the trade rotten foodstuffs. The liability of the manufacture of food products was considered by this Court at length in *Ketterer v. Armour & Co.,* 247 Fed. 921. * * * In that case we laid down the rule that one who puts on the market an imminently dangerous article owes a public duty to all who may use it to exercise care in proportion to the peril involved, and we declare that the liability does not grow out of contract, but out of the duty which the law imposes to use due care in doing acts which in their nature are dangerous to the lives of others."

The question came up before the Circuit Court of Appeals for the Sixth Circuit in *Goullon v. Ford Motor Co.,* 44 F. (2d) 310 and that court stated that the opinion of the New York Court of Appeals in the *Buick Motor Co.* case "states the rule which has been repeatedly followed and has now become the generally accepted law."

The Circuit Court of Appeals for the Eighth Circuit in *Hudson v. Moonier,* 94 F. (2d) 132, 136, stated:

> "The rule is now established that a manufacturer owes to the public a duty, irrespective of contract, to use reasonable care in the manufacture of an automobile and in applying reasonable tests to detect defects and deficiencies therein."

This rule was applied to the manufacture of an automobile by the Supreme Court of Washington in *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P. (2d) 409, where that court said:

> "The rule in such cases does not rest upon contractural obligations, but rather on the principle that the original act of delivering an article is wrong, when, because of the lack of those qualities which the manufacturer represented it as having, the absence of which could not readily be detected by the consumer, the article is not safe for the purposes for which the consumer would ordinarily use it. * * *
>
> "It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they in fact, do not possess; and then, because there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the absence of those qualities when such absence is not readily noticeable."

And also, in *O'Toole v. Empire Motors, Inc.*, 181 Wash. 130, 42 P. (2d) 10, the Supreme Court of Washington had before it the question of whether an action for damages resulting from negligence in repairing an automobile was an action based upon tort or upon contract, and held that it was based upon tort, quoting with approval from 1 Shearman & Redfield, Law of Negligence (6th ed.), §116, as follows:

> "But where, in omitting to perform a contract, in whole or in part, one also omits to use ordinary care to avoid injury to third persons, who, as he could

with a slight degree of care foresee, would be exposed to risk by his negligence, he should be held liable to such persons for injuries which are the proximate result of such omission."

A particularly valuable case is the case of *Kalinowski v. Truck Equipment Co.,* 261 N. Y. S. 657 which finds that the benefit of the rule is not confined to passengers in the defective car. In that case, the defendant was negligent in the repair of a truck, with the result that an axle broke, a wheel came off and struck the plaintiff who was on a sidewalk. The court said:

> "The situations of this plaintiff and the truck were neither strange nor remote from reasonable expectation — the girl walking along a public sidewalk, the truck being driven along a public street. Negligence (under the pleading) caused the truck to break down. The sequel was something unusual, but was of a type which might be expected. And that is the test. 'It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye.' "

Other cases following and applying the rule are:

Quackenbush v. Ford Motor Co., 153 N. Y. Supp. 131;

Heckel v. Ford Motor Co., 101 N. J. L. 385, 128 Atl. 242;

Ratche v. Buick Motor Co., 358 Ill. 507, 193 N. E. 529;

Martin v. Studebaker Corporation, 102 N. J. L. 612, 133 Atl. 384.

An allegation of the complaint is that the negligence in manufacture resulted in a "fatigue fracture." As stated in *The Iron Age* of March 29, 1934, p. 74:

> "It is quite often the case that fatigue failures originate at small stress raisers at the surface, such as scale pits, foreign inclusions, tool marks, quenching cracks, etc. These imperfections are frequently imperceptible to the naked eye. * * * Once they are started the fracture progresses until complete failure occurs."

This axle with this latent defect was intended for use in a truck and, according to paragraph V. of the complaint was represented to be "a suitable, safe and proper axle to be installed and used in such trucks." It is a wellknown fact that trucks are driven on congested highways such as the Pacific Highway, and their use is not confined to bright summer days, but they are also driven on wintry nights when pavements are slick and icy and visibility poor. If the truck so equipped and so being driven sustains the inevitable breakdown while crossing a bridge, it is very probable that the car immediately following will crash into it with injury to its passengers resulting from such crash.

That such crashes have happened without the contributing negligence of the following driver is shown in the following Washington cases:

Devoto v. United Auto Transp'n Co., 128 Wash. 604, 223 Pac. 1050;

Morehouse v. Everett, 141 Wash. 399, 252 Pac. 157;

Tierney v. Riggs, 141 Wash. 437, 252 Pac. 163;

Crowe v. O'Rourke, 146 Wash. 74, 262 Pac. 136;

Griffith v. Thompson, 148 Wash. 243, 268 Pac. 607;

Longmire v. King County, 149 Wash. 527, 271 Pac. 582;

Lindsey v. Elkins, 154 Wash. 588, 283 Pac. 447;

Frowd v. Marchbank, 154 Wash. 634, 283 Pac. 467;

Gilbert v. Solberg, 157 Wash. 490, 289 Pac. 1003;

Crooks v. Rust, 119 Wash. 154, 205 Pac. 419;

Martin v. Puget Sound Electric Railway Co., 136 Wash. 663, 241 Pac. 360;

Wheeler v. Portland-Tacoma Auto Freight Co., 167 Wash. 218, 9 P. (2d) 101;

Layton v. Yakima, 170 Wash. 332, 16 P. (2d) 449;

McMoran v. Associated Oil Co., 144 Wash. 276, 257 Pac. 846;

Henning v. Manlowe, 182 Wash. 355, 46 P. (2d) 1057;

Brauns v. Housden, 186 Wash. 149, 56 P. (2d) 1313.

We therefore respectfully submit that the second amended complaint traces the effect of the original negligence of the appellee through a chain of circumstances that is not broken by any other effective cause, to the damages which accrued to the appellants, and that therefore the demurrer to the second amended complaint should have been overruled.

Assignment of Error 2. The said District Court erred in striking plaintiffs' second amended complaint herein.

The grounds for this motion as therein stated (R. 50) are that the second amended complaint "is sham, frivolous, and contains no new, different or additional material allegations from the allegations contained in plaintiffs' amended complaint."

We have already shown that the second amended complaint states a good cause of action and therefore see no reason for any argument to the effect that it is neither sham nor frivolous, reserving any argument thereon until counsel for appellee shall show wherein this pleading was either sham or frivolous.

In answer to the claim that the second amended complaint "contains no new, different or additional material allegations from the allegations contained in plaintiffs' amended complaint," we call the attention of the court to the allegations of paragraph IX of the second amended complaint which alleges that after the breakdown of the truck "and before it could be removed from the said highway" it was struck by the car occupied by the appellants. The allegation which is new in the second amended complaint is the above quoted clause: "and before it could be removed from the said highway." This allegation effectually bars any claim that any possibility of a removal of the truck from the highway could be an intervening cause in the chain of circumstances leading up to the injuries to appellants.

From the remarks made at the hearing of this motion in the District Court it might appear that that Court was of the opinion that the appellants, having alleged in their original complaint that the Morrison Mill Company was

guilty of a negligent delay in removing the wrecked truck from the highway, were thereby estopped from now claiming that their collision occurred "before it could be removed from the said highway." This theory, however, is directly contrary to the rule of law as laid down by the Supreme Court of the United States in *Washer v. Bullitt County,* 110 U. S. 558, 28 L. Ed. 249. In that case, the plaintiffs in their original petition had alleged a payment which brought the amount sued for below the jurisdictional limit. A demurrer to this petition was sustained with leave to amend. Thereupon the plaintiffs filed an amended petition withdrawing the allegation of payments. The court said:

> "In the amended petition all the averments of the original petition by which the amount in controversy was reduced below $5,000 were withdrawn, and it was averred that the sum of $5,325.14 was due to the plaintiffs for work done under the contract. It was as competent for the plaintiffs, when leave had been given them to amend their petition, to amend it in respect to the sum for which judgment was demanded as in any other matter. The admission in the original petition of the payment of $1,800 was specifically withdrawn in the amended petition, and after the withdrawal of that admission it nowhere appeared in the record that said sum was ever paid. The admission might have been made by the inadvertence or mistake of the plaintiffs or their counsel; but however made it was within their power to withdraw it without assigning reasons for the withdrawal. They were not inexorably bound by the averments of the original petition. When a

> petition is amended by leave of the court the cause proceeds on the amended petition. It was upon the amended petition that the judgment of the court below was given, and the question brought here by this writ of error is the sufficiency of the amended petition. If its averments show that this court has jurisdiction, the jurisdiction will be maintained without regard to the original petition."

In accordance with the rule thus laid down by the Supreme Court of the United States, the validity of this second amended complaint, filed in strict accord with the order of the court, must be adjudged by its own allegations and by nothing else. Inasmuch as we have shown that it stated a good cause of action, it could not be rightly dubbed "sham" or "frivolous" and therefore the motion to strike should have been denied.

Assignment of Error 3. The said District Court erred in dismissing the said action.

The order of dismissal was based upon the sustaining of the demurrer and the granting of the motion to strike and we feel that these matters have already been covered fully in the arguments upon the two preceding assignments.

We therefore respectfully pray that the order of the District Court be reversed and the District Court be ordered to reinstate the action, overrule the demurrer, deny the motion to strike and proceed with the case.

Respectfully submitted,

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Counsel for Appellants.

No. 8880

United States Circuit Court of Appeals

For the Ninth Circuit

MELVIN WHITEHEAD and FERN PECK, by her guardian ad litem, ELLEN BARNARD, *Appellants*,

vs.

REPUBLIC GEAR COMPANY, a corporation, *Appellee*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLEE'S BRIEF

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APPELLEE'S BRIEF

PRELIMINARY STATEMENT

The original complaint (R. 1) in the instant case was filed in the Superior Court of the State of Washington and alleged that the joint negligence of the defendant Morrison Mill Company (owner of a truck) and the defendant Frank Day (truck driver) combined with the negligence of the defendant Republic Gear Company (manufacturer and appellee) to cause the accident in question. Among other things it was alleged (R. 10):

> "That said truck was parked without a tail light or any lights in the rear whatsoever. That said truck could have been coasted off the paved portion

> of said highway before it came to a stop and after said axle broke. That said truck was left without any light, guard, signal or watchman by the driver, an employee of the Morrison Mill Company, and during his absence and while said truck was so standing in its disabled condition * * * "

the instant collision occurred. The plaintiffs subsequently filed an amended complaint (R. 29) in which the only material change was the omission of all specific allegations of negligence on the part of the defendants Morrison Mill Company and Frank Day. At that stage of the proceedings, the defendant Republic Gear Company removed the cause to the U. S. District Court (R. 36) inasmuch as the only remaining controversy was one between the plaintiffs and the defendant Republic Gear Company. Republic Gear Company then filed a demurrer (R. 50) to the amended complaint in the District Court, and after briefs were filed and oral arguments heard by the court, said demurrer was sustained. Plaintiff thereupon filed a second amended complaint (R. 42) which in no material respects altered the allegations purporting to state a cause of action against the Republic Gear Company. Such slight changes as were made were (1) the omission of certain general allegations of negligence on the part of the Morrison Mill Company, and (2) the insertion of an allegation to the effect that the collision occurred "before it (the truck) could be removed from said highway." Incidentally, the original complaint had included an allegation to the effect that the driver *could* have driven onto the shoulder of the road, had he so desired.

The material allegations of appellant's second amended complaint will be summarized in the statement of facts (page 4, this brief).

QUESTION INVOLVED

Appellants' statement of the question involved (page 6 of appellants' opening brief) is erroneous and misleading for it assumes the answer to the real questions raised in the lower court by the appellee's demurrer, which same questions are now before this court for review. Appellants stated the question as follows:

> "Is a manufacturer who negligently manufactures a defective automobile part, knowing that such a defect would constitute a hidden menace to the public when such defective part is used, liable to one who is injured as a proximate result of such use?"

Such question assumes that in fact a hidden menace to the public is shown from the allegations in the complaint, and furthermore, that the defect alleged was the proximate cause of the plaintiff's injuries. The real question which this court must determine is: *whether or not the negligent act of a manufacturer in producing a defective automobile axle which may break while the automobile is being used, causing the vehicle to lose its power of forward propulsion, will create a liability on the part of the manufacturer to third persons (that is, persons having no contractual privity) who are injured when after the first vehicle containing the defective axle has come to rest in a normal and lawful manner, another vehicle containing such third persons as passengers, without any mitigating circumstances being*

alleged, comes into collision with the rear of the lawfully stopped vehicle.

STATEMENT OF FACTS

Appellants in their opening brief have stated the facts by quoting at length the material portions of the second amended complaint. For the assistance of the court those facts may be summarized as follows:

The appellee is alleged to have negligently manufactured and inspected a certain automobile axle, thus leaving it in a defective condition. Furthermore, appellee is alleged to have represented to the public that the axle was safe and fit for installation in trucks such as the one belonging to the Morrison Mill Company. The axle was then sold to a Washington distributor who resold the same to the Morrison Mill Company. The latter company installed the axle in one of its trucks and after continuous use therein for approximately two and a half months and while said truck was proceeding along the highway, the axle broke and the truck became disabled to the extent of being unable to move under its own power, causing the truck to come to rest on the highway. While the truck was stopped, a car in which appellants were passengers came into "violent collision" with said truck, causing the damages which appellants allege. It should be added that the amended complaint contains no allegations whatsoever of any negligent or unlawful acts upon the part of the truck driver; in fact, it is affirmatively alleged that appellants' car crashed into the truck before the driver could have removed

the truck from the place where it had come to rest on the highway. No facts are alleged which explain how the appellants' automobile happened to collide with the truck.

ARGUMENT ON ASSIGNMENT OF ERROR 1

Appellee contends that the court properly sustained the demurrer to the second amended complaint. The argument on this point will be subdivided as follows:

A. Appellee owes no legal duty to the appellants.

B. Appellants are guilty of contributory negligence as a matter of law.

C. Appellee's acts were not the legal or proximate cause of appellants' injuries.

A. APPELLEE OWES NO LEGAL DUTY TO THE APPELLANTS

The liability in tort of a manufacturer to a party who bears no contractual relationship to him has always been strictly limited. In fact, the general rule is that no such liability exists. *Winterbottom v. Wright*, 10 M. & W. 109 (England, 1842). Both the general rule and the exceptions thereto have been exhaustively annotated in 17 A. L. R. 672; 39 A. L. R. 992; 63 A. L. R. 340; 88 A. L. R. 527; 105 A. L. R. 1502; 111 A. L. R. 1239. In the last of the aforementioned annotations the writer concludes as follows (p. 1240):

> "As stated in the earlier annotations, it is a general rule that a manufacturer of a defective article is not liable for injuries to the person or

> property of an ultimate consumer who has purchased from a middle man, unless the article was inherently dangerous to life or property, the theory being that, in the absence of contractual relations between the parties, no liability can be predicated upon the manufacturer's negligence, * * *.
>
> " * * *
>
> " * * * to the general rule of nonliability an exception exists in cases where the article or substance manufactured or packed is inherently or essentially dangerous in its nature, or where an ultimate consumer is likely to be injured because of known improper construction, * * * or because of the use to which it is to be put by whoever may use the same, for the purpose for which it was intended; * * *."

The exception to the general rule upon which the appellants herein are presumably relying was carefully analyzed and set forth with appropriate limitations by the late Judge Cardozo, then of the New York Court of Appeals, in the leading case of *MacPherson v. Buick*, 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F, 696. That case held that despite all absence of contractual privity between the purchaser and the defendant, where the defendant's negligence had permitted a car to be equipped with a defective wheel, the purchaser of such car could recover from the negligent parties for injuries sustained when the wheel collapsed causing the plaintiff-purchaser to be thrown out of the car and severely injured. This decision has been recognized as a landmark in the law of torts, because it far surpassed and extended the limits of tortious liability theretofore recognized. However, since that case, while many juris-

dictions have recognized the salutary results of the holding, countless other decisions have been called forth in order to limit and define the true scope of the new doctrine. It was to be expected that many of the countless thousands of persons injured in automobile collisions would attempt to hold the generally more solvent manufacturers liable if only the *MacPherson* case principle could be *stretched* to cover their situations.

Judge Cardozo himself recognized that the doctrine must be limited and stated that its limits must be ascertained as the cases arose. We quote hereinafter the guiding principles which he announced as a touchstone for determining when a manufacturer would thus become liable in tort, plainly indicating that the new doctrine was to be applied with reason and proper caution as guides. *McPherson v. Buick*, *supra*, 111 N. E. 1050, at 1053):

> "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. There must be *knowledge of a danger, not merely possible, but probable.* It is possible to use almost anything in a way that will make it dangerous if defective. That is not enough to charge the manufacturer with a duty independent of his contract. Whether a given thing

> is dangerous may be sometimes a question for the Court, sometimes a question for the jury. There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer. Such knowledge may often be inferred from the nature of the transaction. But it is possible that even knowledge of the danger and of the use will not always be enough. The proximity or remoteness of the relation is a factor to be considered. We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow." (Italics ours).

Judge Cardozo thus plainly announced that the duty of a manufacturer does not extend to *unforeseeable or remote possibilities* of injury, and that liability would ensue only where *the thing defectively manufactured was "such that it is reasonably certain to place life and limb in peril when negligently made.*" In applying such principles to the facts in the *MacPherson* case, Judge Cardozo said (at p. 1053):

> "This automobile was designed to go fifty miles an hour. *Unless its wheels were sound and strong, injury was almost certain.*" (Italics ours).

An examination of the cases which have applied the doctrine of a manufacturer's liability to third persons makes it eminently manifest that liability has always been predicated upon the presence of a defect which not only was attributable to the manufacturer's negligence, but also created a situation which exposed the plaintiff to an unreasonably and unusually dangerous situation. In words more commonly used by the courts, the negli-

gence must have created a "*hidden menace*" or "*imminent peril.*"

Thus, in *Johnson v. Cadillac Motor Co.*, 261 Fed. 878 (p. 12, appellants' brief), the manufacturer was held liable where the wheel on an automobile was so defective that it collapsed while the car was proceeding along the highway, causing the driver to lose control and the car to turn completely over and upon the plaintiff. Virtually the same facts existed in *Martin v. Studebaker*, 102 N. J. L. 612, 133 Atl. 384 (p. 15, appellants' brief). *Quackenbush v. Ford Motor Co.*, 153 N. Y. S. 131 (p. 15, appellant's brief), involved a defective brake which, on its failure to properly operate, caused the car to swerve violently, and run over an embankment, injuring the passengers.

In *Olds Motor Works v. Schaeffer*, 145 Ky. 616, 140 S. W. 1047 (p. 11, appellants' brief), the alleged defect again caused the driver to lose complete control of his car, violently injuring a passenger.

In *Goullon v. Ford Motor Co.*, 44 Fed. (2d) 310 (p. 13, appellants' brief), a defective steering wheel on a tractor broke, causing the driver to fall from his seat to the ground. In the decision in that case the court said:

> "We think it clear from the evidence in this case, and from common knowledge, that such a fall is the reasonably probable result of such a break. The driver occupies a seat which has no side support, and is surrounded by no cab or other protection. In the ordinary operation of the machine, he could not safely keep his seat, excepting as he

> supports himself by the steering wheel. * * * if the wheel gives way there is substantial probability that he will lose his balance and fall."

In *Hudson v. Moonier*, 94 Fed. (2d) 132 (p. 13, appellants' brief), the plaintiff, who was on foot, was run down by a truck where the driver of the truck could not stop because of defective brakes and could not warn the plaintiff because there was no horn on the car.

In *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P. (2d) 409 (p. 14, appellants' brief), the plaintiff was injured at the time of a collision by flying glass from the windows of his automobile, although the manufacturer had represented the same to be shatter-proof.

In *Heckel v. Ford Motor Co.*, 101 N. J. L. 385, 128 Atl. 242 (p. 15, appellants' brief), a tractor exploded, some of the flying machinery striking the plaintiff-owner.

In *Rotche v. Buick*, 358 Ill. 507, 193 N. E. 529 (p. 15, appellants' brief), a defective brake caused a moving automobile to swerve into a ditch, injuring a passenger. Thus, in each case where the manufacturer of a defective part was found liable, the defective part either caused a moving vehicle to become wholly out of the driver's control, or the defective part itself directly injured some person. Furthermore, in every instance, to use the words of the late Justice Cardozo, when the part was defective in the manner stated, "injury was almost certain."

On the other hand, in the recent case of *Amason v. Ford Motor Co.*, 80 Fed. (2d) 265, the Circuit Court

of Appeals for the Fifth Circuit, affirming the District Court's ruling which had sustained a demurrer to the complaint, found that no cause of action had been stated against the manufacturer. The complaint had alleged that the door on an automobile was of defective design inasmuch as it was hinged from the rear rather than the front of the car, and as a consequence of such design the plaintiff was injured when he attempted to secure the door more firmly while the car was moving along the highway. The court in its opinion said that the car was *safe*, if properly operated. Furthermore (p. 266):

> "The manufacturer could have had no reason to contemplate the probabillty of such an accident from the ordinary use of the car. If the door had been firmly closed before the car was started, or if the car had been slowed down or stopped to shut the door, the accident would not have occurred. The deceased had had the car in his possession and use for some months. If it was dangerous to open the door under conditions shown, he had ample opportunity to acquire that knowledge. It is clear that the sole proximate cause of the accident was the negligence of the deceased in attempting to open and close the door when the car was running at a rapid rate."

The Circuit Court thereupon affirmed the District Court ruling which had dismissed the action on a demurrer. It would seem equally true on our own facts that: "The manufacturer could have had no reason to contemplate the probability of such an accident from the ordinary use of the car." While it is true that in both the *Amason* case and our own, the alleged defect created

the occasion which made the specific injury possible, it is equally true that in both cases the party plaintiff was not injured by any reasonably foreseeable consequence of the respective defective parts. Instead, the injury was the direct result in both situations of conduct by the plaintiffs themselves which was both unreasonable and unforeseeable under the alleged facts.

The appellants in this case are in effect claiming that the manufacturer owes an insurer's duty to the general public to see that every part of an automobile is so perfectly manufactured and inspected that no part shall go into the car which might conceivably require that car to cease its motion upon the highway. If such a duty existed, then even a supplier of gasoline or fuel might find himself liable if in a situation similar to ours the car was required to stop on account of foreign matter being present in the gasoline so as to plug the fuel line. Or suppose a spark plug or head lamp wore out prematurely, or the hood leaked, permitting water to reach the ignition so that a car containing any one of such countless possible defects would lose its power of propulsion upon the highway—could it be cogently argued that a manufacturer of such defective part or equipment thereby rendered himself liable to parties in a position comparable to that of appellants. It must be kept in mind that under the theory of the *MacPherson* case, supra, Cardozo, in announcing the new doctrine, said:

> " * * * If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger.

> Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. *There must be knowledge of a danger, not merely possible, but probable. It is possible to use almost anything in a way that will make it dangerous if defective.* That is not enough to charge the manufacturer with a duty independent of his contract."

To apply the *MacPherson* case doctrine to facts such as suggested in the foregoing illustrations would amount to an absurdity on its face.

The gist of the distinction between the type of situation presented in the appellants' complaint and the type where manufacturers have been held liable becomes plainly manifest when one recognizes that automobiles every day are compelled to stop upon the highway because of disabilities arising from merely worn out parts, parts which are not defective in any manner but merely have come to the termination of their normal life. Certainly, every driver knows, and unquestionably this court would not be exceeding its lawful province in taking judicial knowledge of the fact, that cars are required to stop on the highway because of worn out parts, on many occasions. Such stops are deemed normal and necessary behavior for vehicles—for the day of mechanical perfection is not yet. Many courts have held that automobiles, despite the possibility of such inherent

mechanical disabilities, are not "inherently dangerous instrumentalities" per se. Thus in *Dillingham v. Chevrolet Motor Co.*, 17 F. Supp. 615, 617, the Federal Court quoted from the syllabus of the case of *Ford Motor Co. v. Livesay*, 61 Okla. 231, 160 P. 901, as follows:

> "An automobile is not an inherently dangerous machine and the rules of law applicable to dangerous instrumentalities do not apply."

Yet the truck in the instant case allegedly because of appellee's negligence merely was required to stop upon the highway until a mechanical failure could be located and repaired, or the truck hauled away, in exactly the same manner as would have been done had some part of the car merely worn out. An automobile, truck or otherwise, is not transformed into an inherently or imminently dangerous vehicle because it may merely roll to a stop because of some defective part instead of having been caused to stop by reason of an absolutely unpreventable worn out part.

By no means do we wish to imply that manufacturers should not be held responsible where they create *unusual* and *unreasonably* dangerous conditions. A car with a wheel which may collapse or come off, or brakes which may not work, or whose engine may explode is thereby made a dangerous instrumentality, but such situations are clearly not to be compared with mechanical defects which merely add one more to the countless conditions which may result in a car's being required to stop upon the highway.

As stated in *Blashfield's Cyclopedia of Automobile Law*, (Permanent Edition) at §4812, page 372:

> "To render the manufacturer liable to a third person for injuries the defect must be in a part which would make the vehicle a thing of danger if defective, * * *."

Thus, no recovery is possible where the alleged negligent defect, though constituting an imperfection, does not make the vehicle in question a thing of danger.

The case of *Cohen v. Brockway Motor Truck Corporation*, 268 N. Y. S. 545, is especially pertinent inasmuch as the New York court before whom it arose, while conceding the established authority of the *MacPherson* decision in that jurisdiction, carefully distinguished the same and held that an automobile might well be defective without becoming an imminently dangerous instrumentality. The court's opinion was brief and so clearly apropos on our facts that we will quote it in full:

> "Defendant, Brockway Motor Truck Corporation, is a manufacturer of trucks. It sold one of its trucks to Jacob Cohen, the employer of plaintiff Shirley Cohen. While Shirley Cohen was on the truck, one of the door handles 'gave way and broke causing one of the doors * * * to suddenly open.' As a result 'plaintiff Shirley Cohen was thrown through the said door opening and fell under said truck.'
>
> "Defendant attacks the sufficiency of the complaint. Plaintiffs, in the main, contend that this case is governed by the principle laid down by the Court of Appeals in *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 389, 111 N. E. 1050, 1053, Ann. Cas.

1916C, 440 L. R. A. 1916F, 696. In that case a rear wheel, which was not of sufficient strength to properly run and sustain the machine, collapsed, causing injury. In *Quackenbush v. Ford Motor Co.*, 167 App. Div. 433, 153 N. Y. S. 131, a manufacturer was held liable for simple negligence in selling a car, which was not equipped with proper brakes, with the result that it could not be controlled and ran over an embankment. In each of those cases the defective part in the automobile rendered it, while in motion, a 'thing of danger,' and an accident which was almost inevitable, resulted.

"Certain defective parts make an automobile either inherently or imminently dangerous; others do not. In *MacPherson v. Buick Motor Co.*, supra, Judge Cardozo stated: 'There must be knowledge of a danger not merely possible, but probable. It is possible to use almost anything in a way that will make it dangerous if defective. That is not enough to charge the manufacturer with a duty independent of his contract. Whether a given thing is dangerous may be sometimes a question for the court and sometimes a question for the jury.'

"(1, 2) The doctrine outlined in *MacPherson v. Buick Motor Co.*, should not be extended. It was not intended to make a manufacturer of automobiles liable in negligence for every conceivable defect. We are inclined to the view that it must be in a part which would make an automobile 'a thing of danger.' It cannot be said that this defendant, the manufacturer, could have been charged with 'knowledge of a danger' because of a defective 'door handle.' Such defect may make danger possible, but not probable."

In the case just quoted there can be no question but that the alleged negligent act of the manufacturer theoretically increased the amount of risk assumed by

the plaintiff in the case. However, as was clearly pointed out in the decision, the automobile was not thereby converted into an imminently dangerous instrumentality. Similarly, the possibility that a mechanical part may cease functioning so as to merely necessitate the stopping of a vehicle upon the highway, cannot be said to make such vehicle an imminently dangerous instrumentality. It is a matter of common knowledge that any mechanical device is quite likely to cease functioning at an inopportune or inconvenient time and place; however, such a universally recognized possibility does not in itself call for the application of the imminently dangerous instrumentality doctrine.

This is a mehcanical age and the *MacPherson* doctrine is an outgrowth of the same. It is altogether reasonable and fair to hold a manufacturer of a mechanical device responsible when that thing may react in some abnormal manner creating a situation of imminent danger. The very purpose of the rule is to protect society from the very real risk to which it is exposed when chattels which are dangerous because of defective construction are made available to the public without a warning as to their dangerous condition. The rule was never intended to make manufacturers of mechanical articles insurers against the possibility of a definitely normal or usual breakdown. The law as announced in the cases hereinbefore discussed creates a duty in tort requiring the manufacturer to assume liability arising out of the normal use of a chattel which has become imminently dangerous because of the manufacturer's negligence,

but at least to date no case has seen fit to impose upon a manufacturer (having no contractual privity with a plaintiff) liability where a defective part merely results in a cessation of movement until the part is replaced.

Certainly, if the amended complaint in the instant action states a cause of action against the manufacturer, then every manufacturer of any part in an automobile which, when negligently made, might disable the vehicle so as to require the driver to stop the car even momentarily, would be thrown open to law suits by any person who merely alleged the facts of such "stopping on the highway," plus the additional fact that the plaintiff came into collision with such vehicle after it had come to rest. Both under the common law and by express statute in the State of Washington, it is recognized that automobiles and other vehicles may become disabled while proceeding upon the highway and in such case it is declared lawful for the driver of such vehicle to stop the same upon the highway. §6362-47 of *Remington's Revised Statutes*, reads as follows:

> "§6362-47. PARKING AND STOPPING REGULATIONS. No person shall park or leave standing any vehicle whether attended or unattended upon the paved or improved or main traveled portion of any public highway when it is practicable to park or leave such vehicle standing off of the road or improved or main traveled portion of such highway. * * * *The provisions of this section shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of the public highway in such manner and to such extent that it is impossible to avoid stopping and*

temporarily leaving such vehicle in such position." (Italics ours).

It is thus apparent that the stopping upon the highway on our facts did not constitute any breach of local law.

Few Washington cases seem to have dealt with the instant question. In *Baxter v. Ford Motor Co.*, 168 Wash. 456 (page 14 of appellants' brief), the Washington court held a manufacturer of a vehicle represented as containing shatterproof glass liable to a passenger who, on the occasion of a collision, was injured by shattered glass. The court said:

> "The rule in such cases does not rest upon contractual obligations, but rather on the principle that the original act of delivering an article is wrong, when, because of the lack of those qualities which the manufacturer represented it as having, the absence of which could not be readily detected by the consumer, *the article is not safe* for the purposes for which the consumer would ordinarily use it." (Italics ours).

The only Washington case which seems at all in point on the question of a manufacturer's liability for injuries resulting from defective parts is that of *Foster v. Ford Motor Co.*, 139 Wash. 341, 246 P. 945. In that case the plaintiff sought to hold the defendant company liable for injuries sustained when a Ford tractor ended up and tipped over backwards, upon him. The court denied the relief sought on the grounds that the Ford Company could not possibly have anticipated the injury which occurred. While the situation is not closely analogous,

in some respects the court's language is applicable to our own facts. Among other things, it was said:

> "While it may be assumed that tractors generally are sufficiently simple, so that one, even though devoid of natural mechanical skill, may learn to operate them in a very short time, it cannot be said as a matter of law that the manufacturer could anticipate that one would attempt to operate its product without previous knowledge, either from experience or from the instructions provided in the manual.
>
> "This case bears no similarity to those which involve explosive or poisonous substances bearing either misleading directions or no directions whatsoever indicating the character of the article. The very appearance of a complicated piece of machinery, such as this, is in itself a sufficient warning to one who desires to use it, that he should acquaint himself with its powers and possibilities.
>
> "That the manufacturer, who puts out an article with notice to the purchaser of its limitations, restrictions, or defects, is not liable to third persons injured thereby is so thoroughly established as to be undisputed. *Logan v. Cincinnati, N. O. & T. P. R. Co.*, 139 Ky. 202, 129 S. W. 575; *Olds Motor Works v. Shaffer*, 145 Ky. 616, 140 S. W. 1047, 37 L. R. A. (N. S.) 560; *Pullman Co. v. Ward*, 143 Ky. 727, 137 S. W. 233; *Lewis v. Terry*, 111 Cal. 39, 43 Pac. 398, 31 L. R. A. 220; *Griffin v. Jackson Light & Power Co.*, 128 Mich. 653, 87 N. W. 888; *Ward v. Pullman Co.*, 138 Ky. 554, 128 S. W. 606.
>
> "The rule is nowhere better stated than in *Olds Motor Works v. Shaffer*, supra, which was an action against a manufacturer for damages sustained by a third person, who was injured by reason of a defective rumble seat in an auto put out by it. It was claimed that the purchaser had knowledge of

its defective condition and that fact would relieve the manufacturer. The court said:

" 'In cases like this, the liability of the manufacturer to third parties, where any liability exists, is put upon the ground that the manufacturer of certain articles intended for general use owes what may be called a public duty *to every person using the articles to so construct them as that they will not be unsafe and dangerous, and for a breach of this duty the manufacturer, within the limitations we will point out, is liable in an action for tort—not contract—to third persons who are injured by his breach of duty.* The class of cases, however, in which the maker is liable to third parties is quite limited; the general rule being that no liability attaches for injury to persons who cannot be brought within the scope of the contract. There are, however, well-defined exceptions to the rule of nonliability, and the courts are singularly agreed as to the law applicable to cases of this character. The rules found in text books and cases, defining the liability of the maker of the article to third persons who are injured by its use, are stated substantially as follows by all the authorities: (1) When he is negligent in the manufacture and sale of an article intrinsically or inherently dangerous to health, limb or life; (2) When the maker sells an article for general use, which he knows to be imminently dangerous and unsafe, and conceals from the purchaser defects in its construction, from which injury might reasonably be expected to happen to those using it. Under the first class fall articles, such as poisons or dangerous drugs, that are labeled as containing innocent or harmless ingredients; and in this class of cases it is not essential to a recovery by the injured party against the maker that knowledge of his mistake or negligence should be brought home to him. His liability rests upon the broader ground that persons dealing in articles intrinsically and inherently dan-

> gerous must use a high degree of care in putting them on the market for the protection of the health and lives of those who may naturally and reasonably be expected to use them. And for his negligence or carelessness alone, without any fraud, deceit, or concealment he may be held accountable in damages to any person injured by their use. *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455. But in the other class of cases, where the article itself is not inherently or instrisically dangerous to health or life, a third party, seeking to hold the maker liable for injuries suffered by him in the use of the article, must show that the maker knew it was unsafe and dangerous, and either concealed the defects, or represented that it was sound and safe. But even when this is shown, *the maker will not be liable, if it is made to appear that the purchaser had knowledge of the defects at and before the third party was injured in using it* (citing numerous cases). * * *." (Italics ours).

The analysis of the Washington court in the *Foster* case is equally applicable to our own facts. For without a doubt it is a matter of general knowledge requiring no express notification from the manufacturer, that any motor vehicle may on occasion be compelled to stop on the highway due to either a worn out part or some imperfection in the car. Knowledge of this inadequacy in a mechanical device such as an automobile is most certainly common-place not only to purchasers but to every person who operates the same. No person could reasonably be fooled into thinking that his automobile was so perfectly constructed that the manufacturer impliedly represented to him that it would never be necessary to stop upon any highway because of a mechanical imperfection. It must be apparent, then, following the reason-

ing in the *Foster* case, that the mere stopping of a vehicle on the highway because of a mechanical defect is something which every operator of a vehicle knows may occur at some time in the life of any car, and that the manufacturer whose negligence was the cause of such cessation of movement cannot be held for the consequences of such normal behavior. This analysis may be less familiar than one which refers to remoteness or duty but seems nonetheless satisfactory. It is too well known to need any citation of cases that even among the better courts as well as law text writers, analyses of negligence cases are made from vastly different approaches.

Many authorities would probably find that thedefendant owed no duty to the plaintiffs because of the lack of any reasonable foreseeability of such an accident. Other courts, on the same facts, would probably predicate a finding of nonliability on the grounds of remoteness. Judge Cardozo in *Palsgraf v. Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99, wrote another leading opinion in the field of torts clarifying the meaning of "duty" in negligence cases. The following quotation from his opinion summarizes the facts there involved, and lucidly applies the law (pp. 99, 100, 101):

> "Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held

the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues.

"The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. 'Proof of negligence in the air, so to speak, will not do.' *Pollock*, Torts (11th Ed.), p. 455; * * *. The plaintiff, as she stood upon the platform of the station, might claim to be protected against intentional invasion of her bodily security. Such invasion is not charged. She might claim to be protected against unintentional invasion by conduct involving in the thought of reasonable men an unreasonable hazard that such invasion would ensue. These, from the point of view of the law, were the bounds of her immunity, with perhaps some rare exceptions, survivals for the most part of ancient forms of liability, where conduct is held to be at the peril of the actor. *Sullivan v. Dunham*, 161 N. Y. 290, 55 N. E. 923, 47 L. R. A. 715, 76 Am. ST. Rep. 274. If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality

of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to someone else. '*In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining*, the observance of which would have averted or avoided the injury.' McSherry, C. J., in *West Virginia Central & P. R. Co. v. State*, 96 Md. 652, 666, 54 A. 669, 671 (61 L. R. A. 574); * * *.

"Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all. Bowen, L. J., in *Thomas v. Quartermaine*, 18 Q. B. D. 685, 694. Negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right, in this case, we are told, the right to be protected against interference with one's bodily security. But bodily security is protected, not against all forms of interference or aggression, but only against some. One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended. * * *." (Italics ours).

From this language by Judge Cardozo we believe it wholly fair to say that that eminent jurist would never have permitted the instant plaintiffs to have recovered on our facts. It could hardly be said that the Republic Gear Company in making an axle defective in such manner that it caused a truck to lose its motive power upon the highway constituted a violation of any duty owed to the instant plaintiffs.

The District Court for the Sourthern District of New York in *Schfranek v. B. Moore & Co.*, 54 F. 76, had before it a fact situation which was certainly no more impossible to foresee than the situation alleged in the instant matter. District Judge Woolsey, in that case, said as follows (pp. 77-8):

> "The complaint alleges: That the defendant knew that the packages of Muresco put up and sold by it were intended for ultimate use by painters and decorators, and that the seal which the dealer placed on the package would ordinarily not be broken until the package reached such ultimate users; that the sale of Muresco to retail dealers was for the purpose of resale to such ultimate users; that the plaintiff purchased a package of Muresco; that it was sold to the plaintiff by a retailer of such commodities on the 9th of February, 1930; and that on the same day when the plaintiff was in the act of pouring out some of the powder from the package and had his hand in the package for the purpose of stirring the contents, which he alleges is the ordinary and normal method followed to enable the user of the product properly to manipulate it, his hand was cut by some glass which was intermixed with the Muresco powder.
>
> " * * *.
>
> "*The manufacturer is properly held to a duty to foresee the probable results of such normal use, but he does not have to foresee the possible casual results of a user which departs from the normal.*
>
> "The zone of the possible in casualties is practically limitless.
>
> "Almost anything in the way of an accident is possible. Fully to realize such possibilities usually requires much reflection after the event.

"The zone of the probable, however, is very much narrower, and that is the zone with which tort liability is concerned, and a survey of it involves the exercise of reasonable foresight only.

" * * *.

"Referring with special approval to the principles laid down by Judge Sanborn in *Huset v. J. I. Case Threshing Machine Co.* (C. C. A.) 120 F. 865, 61 L. R. A. 303, Mr. Justice Timlin said, at page 362 of 139 Wis., 121 N. W. 157, 159, 23 L. R. A. (N. S.) 876: 'Negligence in law consists in the omission or inadvertently wrongful exercise of a duty, which omission or exercise is the legal cause of damage to another. * * * The duty is, not to never fail, but not to fail under such circumstances that a reasonably prudent person might infer injury, as a natural and ordinary consequence of such failure, *to one to whom the duty is due.*' " (Italics ours).

In concluding the argument on this point, we earnestly submit that upon the facts of the second amended complaint, the appellee is not shown to have violated any duty owed to the appellants (1) because no facts are stated which indicate that the allegedly defective axle created an imminently dangerous and reasonably foreseeable situation, and (2) because in any event, since it is a matter of common knowledge that automobiles do fail mechanically in countless ways so as to cause them to merely roll to a stop upon the highway, that this appellant must likewise have known of the existence of such condition and therefore cannot avail himself of any claim of unknown and/or hidden danger.

B. APPELLANTS ARE GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW

Upon the allegations of the second amended complaint, the plaintiff should be found guilty of contributory negligence as a matter of law. The general rule to be derived from an examination of the cases is found stated in *Volume 87 A. L. R.* 900 at 901 as follows:

> "As shown by the cases cited in the earlier annotation and the following later cases, some of which involved specific statutes to that effect, it is a well established general rule that it is negligence as a matter of law for one to drive a motor vehicle at such a rate of speed that it cannot be stopped in time to avoid an obstruction discernible within the range of his vision ahead."

The general rule thus stated is supported by the following cases, among others:

Dennis v. Stuckey, 37 Ariz. 299, 294 Pac. 276;

Jones v. Hedges, 123 Cal. App. 742, 12 Pac. (2d) 111;

Pennsylvania R. Co. v. Huss, 96 Ind. App. 71, 180 N. E. 919;

Wosoba v. Kenyon, 215 Iowa, 226, 243 N. W. 569;

Testard v. New Orleans, 8 La. App. 238;

Lett v. Summerfield & Hecht, 239 Mich. 699, 214 N. W. 939;

Frazier v. Hull, 157 Miss. 303, 127 S. 775;

Curtis v. Hubbel, 42 Ohio App. 520, 182 N. E. 589;

Cushing Ref. & Gasoline Co. v. Deshan, 149 Okla. 225, 300 Pac. 312;

Filer v. Filer, 301 Pa. 461, 152 Atl. 567;

Fulker v. Pickus, 59 S. D. 507, 241 N. W. 321;

Nikoleropoulos v. Ramsey, 61 Utah 465;

Steele v. Fuller, 104 Vt. 303, 158 Atl. 666.

In *Morehouse v. Everett*, 141 Wash. 399, 252 P. 157, cited by appellants at page 16 of their brief, the Washington court after having carefully considered both its own earlier decisions and outside authorities, referred to probably the leading case of *Lauson v. Fond du Lac*, 147 Wis. 57, 123 N. W. 629, and said:

> "We seriously doubt whether this case, which is the leading one, supports the rule contended for. If this opinion means that one driving an automobile at night must, under all circumstances, see any object in the road in front of him which comes within the radius of his lights, and be able, under all circumstances, to stop his car before striking the object, then we are unable to agree with it. On the contrary, *if it holds that he must see any object which an ordinarily prudent driver under like circumstances would have seen, then we think it states the law correctly.*" (Italics ours).

In a later Washington case, that of *Sebern v. Northwest Cities Gas Company*, 167 Wash. 600 at 604, 10 P. (2d) 210, the same court said:

> "It is the duty of the driver of an automobile to drive in such a manner that the vehicle can be stopped within a reasonable distance before striking objects in front of it. *Jacklin v. North Coast Transportation Co.*, 165 Wash. 236; 5 Pac. (2d) 325."

Thus the Washington court has recognized and approved the general rule. There are, of course, exceptions to the rule, and a careful examination of the Washington cases cited in appellants' brief at pages 16 and 17 will show that each case is no more than an illustration of a situation presenting an exception to the rule, because of the additional facts present. In such cases the issue of contributory negligence becomes a jury matter.

In twelve out of the sixteen cases cited by appellant at pages 16 and 17 of their brief to show that a following car may not be guilty of contributory negligence in colliding with the rear of the car ahead, the facts clearly reveal that the car or other object which was run into upon the highway was either wholly without lights or insufficiently lighted. See:

Morehouse v. Everett, 141 Wash. 399, 252 Pac. 157;

Tierney v. Riggs, 141 Wash. 437, 252 Pac. 163;

Griffith v. Thompson, 148 Wash. 243, 268 Pac. 607;

Longmire v. King County, 149 Wash. 527, 271 Pac. 582;

Frowd v. Marchbank, 154 Wash. 634, 283 Pac. 467;

Gilbert v. Solberg, 157 Wash. 490, 289 Pac. 1003;

Crooks v. Rust, 119 Wash. 154, 205 Pac. 419;

Martin v. Puget Sound Electric Railway Co., 136 Wash. 663, 241 Pac. 360;

Wheeler v. Portland-Tacoma Auto Freight Co., 167 Wash. 218, 9 P. (2d) 101;

Layton v. Yakima, 170 Wash. 332, 16 P. (2d) 449;

McMoran v. Associated Oil Co., 144 Wash. 276, 257 Pac. 846;

Henning v. Manlowe, 182 Wash. 355, 46 P. (2d) 1057.

In *Brauns v. Housden*, 186 W. 149, 56 P. 1313, it appeared that the blinding headlights of vehicles approaching from the other direction obscured the vision of the driver of the colliding vehicle.

In the case of *Lindsey v. Elkins*, 154 W. 588, 283 P. 447, it appeared that the entire roadway was blocked by one car which had no lights at all and a second car which had come up alongside and parked there, so as to totally obstruct the right of way.

In the two remaining cases cited by appellants on the instant point, *Devoto v. United Auto Transp. Co.*, 128 W. 604, 223 P. 1050, and *Crowe v. O'Rourke*, 146 W. 74, 262 P. 136, a sudden and impenetrable fog and an equally impenetrable cloud of dust blinded the vision of the drivers of the respective colliding vehicles.

In our instant case no such mitigating circumstances are alleged in the complaint. It is simply alleged that the truck came to rest upon the highway and the appellants' car thereafter came into violent collision with the truck. Upon such facts, which are the only facts admitted by the demurrer, we are presented with a perfect case for the application of the general rule holding appellant guilty of contributory negligence as a matter of law.

C. APPELLEE'S ACTS WERE NOT THE LEGAL OR PROXIMATE CAUSE OF THE APPELLANT'S INJURIES

The complaint, on demurrer, must show by its factual allegations, not only that the defendant's acts violated a legally recognized duty owed to the instant plaintiff, but also that such violation was the legal or proximate cause of the injury. The rule is set forth in *45 C. J.* at page 1093 in these words:

> "In accordance with the rule that a person who has been guilty of negligence is liable only for injuries which are proximately caused by such negligence, a mere allegation of negligence on the part of defendant and of the loss or injury sustained by plaintiff does not charge defendant with responsibility for the damage; but the declaration or complaint must show a casual connection between the negligence charged and the injury sustained, that is, it must, either by a direct averment or by statement of facts, show that the negligence charged was the efficient and proximate cause of the injury sustained."

The instant complaint contains no allegations which show that the defective axle, itself, caused the appellant to run into the truck. It is true that the defective axle caused the truck to lose its power of forward propulsion, but such causative chain ceased when the truck came to rest upon the highway in a strictly lawful manner. There is no showing that the broken axle set into operation other unlawful acts which may themselves have been a legal cause of the injury. As a matter of fact, the com-

plaint merely shows, insofar as the cause of the collision is concerned, that the appellants came into violent collision with a lawfully stopped vehicle. Upon such facts, we submit this court can only presume that the collision was due to the appellants' failure to observe the truck's presence upon the highway. No mitigating circumstances are alleged which might excuse the act of the appellants in colliding with the truck and even if such circumstances were alleged it would also be necessary for the appellant to establish a casual connection between such circumstances and the alleged acts of negligence.

In *Ervin v. Northern Pacific Railway Company*, 69 Wash. 240, 124 P. 690, the Washington Supreme Court had to pass upon the sufficiency of a complaint, and in sustaining the lower court's finding that such complaint was insufficient in law, the appellate court based its conclusion upon the lack of a showing of any causal connection between defendant's acts and the plaintiff's injury. In summarizing the complaint the court said:

> "The question presented in the sufficiency of the amended complaint. Appellant in substance alleged that he was employed as a track worker for respondent; that over him was a foreman, also employed by respondent; that on October 7th, 1908, the foreman carelessly and negligently permitted a hand
>
> car to remain on respondent's railway track in such a position that it was liable to become an obstruction to approaching trains; that an engine approached from a side track and the foreman directed appellant and other track workers to remove the handcar;

> * * * that the engine was near at hand; * * * that, to get the handcar from the track before being struck by the engine, it was necessary for appellant to use extraordinary physical effort, which he did, and that he thereby sustained a hernia, the injury of which he complains."

In applying the law, the court said:

> " * * * The only cause of appellant's injury was his overexertion. The foreman did not order him to use extraordinary effort. There is no allegation that an insufficient number of trackmen were employed, that the engine was out of repair, that the track was not in proper condition, that the handcar should not have been on the track in the first instance, nor that the approaching engine was not under sufficient control to avoid a collision. The circumstances pleaded show an unfortunate action to appellant, but fail to show any negligence on the part of respondent for which it can be held liable."

Likewise in the instant case, though appellees' acts may be said to have caused the truck to stop whereby it became possible for the plaintiff to become injured in the way alleged, so far as is apparent from the instant complaint the only proximate cause of the collision was the act of the driver of appellants' car in unaccountably running into a lawfully stopped vehicle.

We submit, that the instant complaint fails to show wherein any wrongful acts of the appellee were the legal or proximate cause of the appellants' car running into a lawfully stopped vehicle.

ASSIGNMENT OF ERROR No. 2

The grounds for defendants' motion to strike the second amended complaint are set forth in the defendants' motion to strike (R. 50) and the affidavit (R. 51) which was attached to said motion.

It is to be noted, particularly, that the second amended complaint follows the amended complaint practically verbatim save for the omission of the general allegations of negligence of the Morrison Mill Company and the insertion of an allegation to the effect that the collision occurred "before (the truck) it could be removed from the highway." In the original complaint it had been alleged that the "truck could have been coasted off the paved portion of said highway," a statement which contradicts the allegation inserted in the second amended complaint. The original complaint had also contained a number of allegations as to specific acts of negligence by the truck driver, but all of such allegations have been omitted from the second amended complaint.

Upon such a showing it is submitted that the lower court acted wholly within its discretionary power in granting the defendant, Republic Gear Company's motion to strike. The law relative to the motion in question is stated in *Bancroft on Code Pleadings* at page 896 of Vol. I, as follows:

> "It is the general rule that matters inserted in a pleading may be stricken out when they are irrelevant or redundant, or when they are immaterial, unnecessary, superfluous, scandalous, sham, or frivolous."

At page 902 of the same work, we find:

> "An entire pleading may be stricken out in a proper case, as where it is sham or frivolous, * * *."

And at page 908:

> "A 'sham' answer is one good in form but false in fact, or, according to many cases, one good in form but false in fact, and not pleaded in good faith."

We conclude, that it was within the province of the District Court to grant the motion to strike in view of the record and the affidavit of defendant, both of which tended to show that the second amended complaint was sham, immaterial and not pleaded in good faith. However, in any event, the District Court also ruled on the merits of the second amended complaint finding it insufficient in law, which ruling has been covered fully by our argument on assignment of error 1, supra.

ASSIGNMENT OF ERROR No. 3

The District Court ruled correctly in dismissing the instant action. This ruling was based upon the specific rulings of the court discussed hereinabove under Assignments 1 and 2.

We respectfully pray that each and every order of the District Court appealed from in the instant proceedings be affirmed.

Respectfully submitted,

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STANLEY B. LONG,
DONALD E. LELAND.

No. 8880

IN THE UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MELVIN WHITEHEAD and FERN PECK, by her guardian ad litem, ELLEN BARNARD,
Appellants

vs.

REPUBLIC GEAR COMPANY, a corporation,
Appellee.

APPELLANTS' REPLY BRIEF

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

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APPELLANTS' REPLY BRIEF

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

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No. 8880

IN THE UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MELVIN WHITEHEAD and FERN PECK, by her guardian ad litem, ELLEN BARNARD,
Appellants

vs.

REPUBLIC GEAR COMPANY, a corporation,
Appellee.

APPELLANTS' REPLY BRIEF

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLEE'S "PRELIMINARY STATEMENT"

Counsel for the appellee commence their brief by quoting the original complaint in this action. From this it would appear that they have the idea that this case is to be determined upon the allegations of such original

complaint, thus ignoring the decision of the Supreme Court in *Washer v. Bullitt County,* 110 U. S. 558, 28 L. ed. 249, which we cited upon page nineteen of our opening brief. The counsel for the appellee seem to disagree with the Supreme Court when it said of litigants who were standing upon their amended petition:

> "They were not inexorably bound by the averments of the original petition. When a petition is amended by leave of the court the cause proceeds on the amended petition. It was upon the amended petition that the judgment of the court below was given, and the question brought here by this writ of error is the sufficiency of the amended petition."

To apply the above quotation to the present case, we have only to substitute "second amended complaint" for "amended petition" and "appeal" for "writ of error," and then we would have the following as the law of this case:

> "It was upon the seconded amended complaint that the judgment of the court below was given, and the question brought here by this appeal is the sufficiency of the second amended complaint."

QUESTION INVOLVED

The "question involved" as submitted by counsel for the appellee contains some somewhat weird statements. For instance, the statement that "the first vehicle containing the defective axle has come to rest in a *normal* and lawful manner." (Italics ours.) It is a rather far fetched statement to say that a truck while being oper-

ated upon a much travelled highway on a wintry night and coming to rest upon a bridge on account of a broken axle actually came "to rest in a normal manner."

Furthermore, the appellee's question contains the astonishing statement that the vehicle containing the appellants as passengers "without any mitigating circumstances being alleged, comes into collision with the rear of the lawfully stopped vehicle." Here counsel for the appellee overlooks the allegation of the second amended complaint that the car in which the appellants were passengers was being driven "in a careful and prudent manner," and also that the collision and the resulting damages to the appellants occurred "as the result of the negligence of the said defendant." It being the admitted facts of this case that the car in which the appellants were riding was being driven "in a careful and prudent manner," (which, of course, means without any negligence whatsoever) there is no necessity of alleging any "mitigating circumstances."

APPELLEE'S "STATEMENT OF FACTS"

The appellee's statement of facts omits various very important allegations of the second amended complaint. For instance, it omits the allegation (R. 44) that "there was nothing about the said axle which was or would be apparent to a purchaser in the exercise of ordinary care to indicate to such purchaser, or give to such purchaser any notice of, the defects hereinafter set forth, and at all times up to the time of the accident hereinafter set forth, the

said Morrison Mill Company had no notice or knowledge, or any reasonable opportunity to have notice or knowledge, of the defects of the said axle hereinafter set forth."

The appellee's statement of facts also omits the allegation that the car in which the appellants were passengers came into violent collision with the said truck *while it "was being driven in a careful and prudent manner"* (R. 46).

Furthermore, the statement that no facts are alleged which explain how the appellants' automobile happened to collide with the truck is a rather startling statement in view of the allegations of the second amended complaint that the truck became disabled and unable to proceed on a bridge on the Pacific Highway on a wintry night and the car in which the appellants were passengers, and which was being driven in a careful and prudent manner, came into violent collision therewith (R. 46). Just what other facts are necessary it would be a somewhat difficult matter to determine. In other words, it plainly appears from the complaint that while the appellants were passengers in a car being driven in a careful and prudent manner across a long bridge on a much travelled highway upon a wintry night, suddenly a disabled truck looms up in front of them, that without any intervening cause other than the immovability of the truck and the momentum of the appellants' car, a violent collision ensues. Just what other facts could be alleged we are unable to discover.

APPELLEE'S CLAIM THAT "IT OWES NO LEGAL DUTY TO THE APPELLANTS"

Counsel for appellee are compelled to admit that, under the precedents, manufacturers owe a duty to the general public to use due care to manufacture reasonably safe parts of an automobile, such as wheels:

MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050;

Johnson v. Cadillac Motor Car Co., 261 Fed. 878;

Martin v. Studebaker Corp., 102 N. J. L. 612, 133 Atl. 384.

Brakes:

Rotche v. Buick Motor Co., 358 Ill. 507, 193 N. E. 529;

Quackenbush v. Ford Motor Co., 153 N. Y. Supp. 131.

Body:

Olds Motor Works v. Shaffer, 145 Ky. 616, 140 S. W. 1047.

Steering wheel:

Goullon v. Ford Motor Co., 44 F. (2d) 310.

Glass Windshield:

Baxter v. Ford Motor Co., 168 Wash. 456, 12 P. (2d) 409.

but appear to be of the opinion that because none of these accidents resulted from a defective axle, there is no

law requiring that a manufacturer of axles should use reasonable care to see that such axles are reasonably safe. In other words, wheels must be safe, brakes must be safe, steering apparatus must be safe, but anything can be foisted on the public in the form of an axle which the public can be induced to buy.

In spite, however, of the immunity in favor of the manufacturer of defective axles suggested by counsel for the appellee, such immunity was denied in *Kalinowski v. Truck Equipment Co.,* 261 N. Y. S. 657.

In other words, counsel for appellee appear to claim that the statement of Judge Cardozo in the MacPherson case to the effect that, "Unless its wheels were sound and strong, injury was almost certain," was to be applied only to wheels and could not be extended to the axle which connects the wheels with the balance of the truck, and must sustain the full weight of the truck and therefore, under the appellee's claim the statement "unless its wheels were sound and strong, injury was almost certain," could not be extended to include the statement, "unless its axles were sound and strong, injury was almost certain."

We note that the case of *Hudson v. Moonier,* 94 F. (2d) 132, has been reversed by the Supreme Court of the United States, in *Hudson v. Moonier,* 304 U. S. 397, 82 L. Ed. Adv. Sheets 986, 58 S. Ct. 954, but the reversal was based upon the rule that "the court should have applied the law of Missouri where the injury occurred," and not because the Supreme Court disagreed with the de-

cision as a rule of general law. The alleged negligence in that case as stated by the Supreme Court consisted of a lessor's failure to equip a truck with a horn or other signaling device, a lack which was plainly apparent to the lessee and the driver. The fact, however, that the rule in Missouri in such a case is that a lessor owed no duty to the public to see that a rented truck was equipped with a proper horn, can not be binding upon this court in deciding a case arising out of an accident which occurred in the State of Washington. The rule in the State of Washington is in accord with the general rule.

> *Baxter v. Ford Motor Co.*, 168 Wash. 456, 12 P. (2d) 409;
>
> *O'Toole v. Empire Motors, Inc.*, 181 Wash. 130, 42 P. (2d) 10.

Counsel for appellee further appear to claim (their br. p. 11) that negligence in manufacturing and selling a defective axle should be treated in the same way as the designing of an automobile so as to have the door hinged at the rear instead of the front, and as to the size, shape and position of the handle and catch. To baldly state such a proposition is to show its utter ridiculousness. The writer of the opinion in *Amason v. Ford Motor Co.*, 80 Fed. (2d) 265, in reference to the cases which we have already cited, said:

> "It was held that a manufacturer owed a duty to the public to use ordinary care in inspecting the parts of a motor vehicle before putting it on the market, so that if an accident was caused by the breaking of a defective part, in the ordinary use of

the vehicle, the manufacturer would be liable for negligence if he had failed to properly inspect the car before selling it,"

On pages 12 and 13 of appellee's brief, we find the astonishing doctrine advanced that there is no responsibility upon anyone to see that an automobile is in condition to go through with a prospective trip without breaking down. Such an idea is contrary to the very fundamental idea of law on the subject of automobiles:

> "The owner or driver of a motor vehicle must exercise reasonable care, in the inspection of his machine, to discover any defects that may prevent its proper operation, and to see that it is in such condition, as to equipment and safety appliances, that injuries to others using the highway will not result from defects in such equipment."
>
> Blashfield Cyclopedia of Auto. Law & Practice, Perm. Ed. Vol. 2, p. 1, §821.

> "Generally speaking, it is the duty of one operating a motor vehicle on the public highways to see that it is in reasonably good condition and properly equipped, so that it may be at all times controlled, and not become a source of danger to its occupants or to other travelers."
>
> Huddy, Cyc. of Auto. Law, 9th Ed., Vol. 3-4, p. 127, §71.

> "In the operation of their truck, hauling a heavy load over a mountainous road, they were under a duty to have it properly equipped for such service."
>
> *Graves v. Mickle,* 176 Wash. 329, 333, 29 P. (2d) 405.

"A motor vehicle is a complicated piece of mechanism, and some part of it may give way and cause it to stall, no matter what degree of care the operator may have exercised to keep it in proper condition. But the operator must exercise a reasonable degree of care to keep it in proper condition, and it is a want of such care to permit it to stall for want of a sufficient supply of gasoline."

Keller v. Breneman, 153 Wash. 208, 211, 279 P. 588.

The reason for the above rule is that everyone knows that a defective auto on the highway is a menace to the general public and everyone is bound to use due care to see that his negligence does not cause such a menace.

Counsel for appellee further appear to be of the opinion that merely because the truck in question did not run off the bridge or turn over, resulting in the maiming or killing of its driver, the responsibility for any other kind of an accident could not be ascribed to it. It is true in this case that the driver of the truck succeeded in bringing the truck to a standstill without injury either to the truck or to himself, but "before it could be removed from the said highway" the following car, which was being driven in a prudent and careful manner, came into collision with it. There can be no question but what a disabled truck standing upon a much travelled highway on a wintry night is a menace to the travelling public, and it is only common sense that the party who is directly responsible for such menace should be called upon to respond for the damages which proximately result therefrom.

We agree with the writer of the opinion in the case of *Cohen v. Brockway Motor Truck Corp.,* 268 N. Y. S. 545,

> "We are inclined to the view that it must be in a part which would make an automobile 'a thing of danger.' "

Most certainly an axle, intended for use on a heavy truck, which is so defective that, while being normally used, it breaks after only ten weeks of use is well defined "a thing of danger."

Again, on page 17 of appellee's brief, appears the claim that this breakdwown was "a definitely normal and usual breakdown." In all the cases in appellate courts relating to automobile accidents, we note but one case, that of *Kalinowski v. Truck Equipment Co.,* 261 N. Y. S. 657, which resulted from a defective axle. To say that such a breakdown is "a definitely normal or usual breakdown" is rather a broad statement. On the contrary, such a breakdown is so rare that it is evident that with proper care in manufacture, it could not happen.

The case of *Foster v. Ford Motor Co.,* 139 Wash. 341, 246 P. 945, is not in point here at all, for as appears from the extended quotation contained in appellee's brief in that case, the manufacturer put out the article "with notice to the purchaser of its limitations, restrictions, or defects." The Supreme Court of the State of Washington expressly recognized in that case, however, the rule laid down in *Olds Motor Works v. Shaffer,* 145 Ky. 616, 140 S. W. 1047, that "the manufacturer of certain articles in-

tended for general use owes what may be called a public duty to every person using the articles to so construct them as that they will not be unsafe and dangerous, and for a breach of this duty, the manufacturer, within the limitations we will point out, is liable in an action for tort—not contract—to third persons who are injured by his breach of duty."

The distinction made by the Supreme Court of Washington between the rule which it applied in the Foster case and the rule for which we contend is set out in the last sentence of the quotation from the Foster case, on page 22 of appellee's brief:

> "But even when this is shown, the maker will not be liable, if it is made to appear that the purchaser had knowledge of the defects at and before the third party was injured in using it."

Any claim that the Morrison Mill Company, the purchaser of this defective axle, had any notice or knowledge of the defect, was expressly negatived in paragraph V of the second amended complaint.

At the foot of page 22 of appellee's brief, we find the astonishing statement:

> "No person could reasonably be fooled into thinking that his automobile was so perfectly constructed that the manufacturer impliedly represented to him that it would never be necessary to stop upon any highway because of a mechanical imperfection."

The allegations of paragraph V of the second amended complaint is that the appellee, "advertised and represented to the public that the said axle was of chrome steel

and was a suitable, safe and proper axle to be installed and used in such trucks as the truck of said Morrison Mill Company." To say that the Morrison Mill Company ought not reasonably to be fooled into thinking that this axle would last more than ten weeks of ordinary use is rather a surprising statement.

We respectfully submit that in spite of claims of counsel for appellee in their conclusion on page 27 of their brief, the second amended complaint alleged facts which prove conclusively that this defective axle created an eminently dangerous situation, and one that was not only reasonably foreseeable, but which was bound to happen if only the defect came to its logical conclusion while the truck was being operated on a wintry night on a much frequented highway. Also, while automobiles do fail mechanically, such failures do not just happen, but are the results of somebody's carelessness.

APPELLEE'S CLAIM OF CONTRIBUTORY NEGLIGENCE

Counsel for appellee claim that the appellants are guilty of contributory negligence as a matter of law. They begin this argument with quoting a rule found in 87 A. L. R. 900, at 901, to the effect that it is negligence as a matter of law for one to drive a motor vehicle at such a rate of speed that it cannot be stopped in time to avoid an obstruction discernible within the range of his vision ahead. This rule has been expressly repudiated by the Supreme Court of the State of Washington in the *en banc*

decision in the case of *Morehouse v. Everett,* 141 Wash. 399, 252 P. 157, wherein the court said regarding this rule:

> "The rule contended for is, in our opinion, entirely too broad, and, if put in effect, would have very serious and unjust results. It loses sight of the fact that one driving at night has at least some right to assume that the road ahead of him is safe for travel, unless dangers therein are indicated by the presence of red lights; it does not take into consideration the fact that visbility is different in different atmospheres and that at one time an object may appear to be one hundred feet away, while at another time it will seem to be but half that distance; it fails to consider the honest error of judgment common to all men, particularly in judging distances at night; it loses sight of the fact that the law imposes the duty on all autos traveling at night to carry a red rear light and the duty on all persons who place obstructions on the road to give warning by red lights or otherwise; it fails to take into consideration the glaring headlights of others and the density of the traffic, and other like things which may require the instant attention of the driver; it does not take into consideration that a driver at night is looking for a red light to warn him of danger and not for a dark and unlighted auto or other obstruction in the road." (p. 408)

Also, in *Devoto v. United Auto Transportation Co.,* 128 Wash. 604, 609, 223 P. 1050, the Supreme Court of the State of Washington said:

> "It is urged that there was error in instructing the jury to the effect that it was the duty of the driver of the stage to drive at such a rate of speed as to en-

able him to stop within the distance disclosed to his view by his own headlights. In view of the evidence in this case, we fear the rule laid down is so severe as to be impracticable. One of the respondents testified to the effect that the fog lay in banks or strips, in places not so dense as to interfere with a reasonable view ahead, but proceeding, they came into places where the fog was so dense that the white light of the headlights was mirrored back to the driver and he could see nothing in advance of his automobile. Under such conditions, shall a driver stop in the fog bank until the fog clears? If one does so, all must do so, or the danger would be thereby increased and if all stop, how shall anyone reach his destination? It seems to us in reason that traffic must be permitted to move on the highway at all times, but that, in driving through a fog bank, each driver must do so in a careful and prudent manner with due regard for the safety of others, and what is careful and prudent under the particular conditions shown will usually be a question for the jury" (pp. 609, 610).

It thus clearly appears that the rule laid down in the beginning of the argument of counsel for appellee on this point is not the rule followed by the Supreme Court of the State of Washington, and under the recent decision of the Supreme Court of the United States the Federal Courts are bound to follow the rules of law laid down by the courts of the state in which the cause of action arose. In *Hudson v. Moonier,* 304 U. S. 397, 82 L. Ed. Adv. Sheets 986, 58 S. Ct. 954, the court used the following language:

"Respondent brought this suit to recover damages

for personal injuries alleged to be due to the defendants' negligence. * * *

"Judgment against both defendants was affirmed by the Circuit Court of Appeals. The court treated the question of the liability of the lessor as one of general law. The court should have applied the law of Missouri where the injury occurred. *Erie R. Co. vs. Tompkins,* decided April 25, 1938. (304 U. S. 64 ante, 787, 58 S. Ct. 817, 114 A. L. R. 1487.)"

The Supreme Court of Washington, having definitely repudiated the rule that a driver must in all cases be able to stop within the range of his own lights, there is nothing in this case to negative the allegation that the appellants' car was being driven in a careful and prudent manner.

APPELLEE'S ACTS WERE THE LEGAL AND PROXIMATE CAUSE OF APPELLANTS' INJURIES

There was absolutely nothing novel or abnormal about this accident other than the negligence of the appellee in manufacturing and selling this latently defective axle. Such an axle is bound to break without warning. The truck was being used in a perfectly normal and to be expected manner. The breakdown of the truck under the conditions existing (which must be anticipated) was quite likely to be followed by a collision with the car immediately following it with resulting damage. There was nothing about this accident which the appellee was not under a legal duty to foresee as a probable result of its manufacturing and selling a latently defective axle.

ASSIGNMENT OF ERROR NO. 2

Appellee again on page 35 of its brief refer to the allegations of the original complaint, entirely ignoring the rule which we have heretofore shown that the question brought here is the sufficiency of the second amended complaint. Under the authority of *Washer v. Bullitt County,* 110 U. S. 558, 28 L. Ed. 249, it was within the power of the appellants to withdraw any allegations of the complaint "without assigning reasons for the withdrawal."

We therefore respectfully submit that the question brought here is the sufficiency of the second amended complaint, that it is sufficient, that the demurrer to it should have been overruled and the motion to strike it denied, that the order of the District Court should be reversed, and the District Court ordered to proceed with the case.

Respectfully submitted,

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